



**Maneno v Makueni County Public Service Board & 3 others (Constitutional
Petition 2 of 2020) [2022] KEHC 12593 (KLR) (10 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12593 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CONSTITUTIONAL PETITION 2 OF 2020
GMA DULU, J
AUGUST 10, 2022**

BETWEEN

KENNEDY MANENO PETITIONER

AND

MAKUENI COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

**HON. PROF. KIVUTHA KIBWANA GOVERNOR, MAKUENI
COUNTY 2ND RESPONDENT**

BENJAMIN MUOKA MUTIE 3RD RESPONDENT

THE SPEAKER, MAKUENI COUNTY ASSEMBLY 4TH RESPONDENT

JUDGMENT

1. Before me is a petition dated April 15, 2020 and filed on April 16, 2020 in which the petitioner Kennedy Maneno seeks three orders as follows;
 - a. A permanent injunction to be issued against the 1st, 2nd and 4th respondent from swearing in the 3rd respondent.
 - b. A permanent injunction be issued against the 3rd respondent from interfering in any way or manner with the matters of the County Government of Makueni.
 - c. Costs to be paid by the respondents.
2. Filed with petition were several attached documents Marked “KM1” to “KM5” relating to the 1st respondent, the Makueni County Public Service Board, regarding the advertisement for the vacant position of County Secretary and the interview proceedings leading to the appointment of the 3rd respondent as County Secretary of Makueni County, but with no supporting affidavit.



3. The petition was also filed with a notice of motion of even date, also filed on the same April 16, 2020, seeking similar injunctive orders to those sought in the petition, pending the hearing and determination of the application and the petition. On April 20, 2020 this court granted prayer 2 of the notice of motion dated April 15, 2020 in effect granting interim injunctive orders restraining the 3rd respondent from assuming office pending hearing and determination of the application. The petitioner also filed another application dated April 21, 2020 for enforcement of the earlier injunctive orders, but on April 22, 2020, this court made orders to the effect that the application dated April 15, 2020 had been overtaken by events, while the application dated April 21, 2020 would serve no purpose anymore, as the 3rd respondent had already been sworn in. Thus the two applications were dispensed with by the court, and what was left for determination herein was only the main petition herein.
4. The petition is opposed through several replying affidavits. The first is a replying affidavit sworn on May 11, 2020 by Prof Kivutha Kibwana the 2nd respondent, in which, it was deponed that the application was misconceived and that it was also not clear whether the petitioner was challenging the appointment of the County Secretary or the Secretary to the County Public Service Board. It was further deponed that the two posts were properly advertised and that the 2nd respondent was not the appointing authority, and as such there was no reason for joining him as party.
5. The petition is also opposed by the 3rd respondent through a replying affidavit sworn by himself on May 9, 2020 in which it was deponed that the petition was scandalous and misconceived, and that the position of Secretary of the County Public Service Board was different from the position for County Secretary.
6. It is further deponed that the deponent had previously been Chairman of the County Service Board up to August 4, 2019, and that later he applied for the advertised post of County Secretary and had been interviewed and already been sworn in, and assumed office, thus this petition had been overtaken by events.
7. The petition has also been opposed through an affidavit sworn on May 11, 2020 by Everlyne M Nzube, the Head of Human Resource, County Public Service Board, in which it was deponed that the office of the County Secretary and office of Secretary/CEO to the County Public Service Board were two distinct offices in the Makueni County.
8. It was further deponed that when the position of Secretary of the Public Service Board fell vacant, she was appointed on August 5, 2019 to perform its functions on acting capacity, and that the said post was later advertised and filled on April 17, 2020.
9. It was further deponed in the said affidavit, that the post of County Secretary having fallen vacant, the Governor (2nd respondent) requested the Public Service Board to spearhead the appointment and advertisements were properly done, thus the consequent interviews conducted and the appointment of 3rd respondent, cannot be said to be biased.
10. The petition has also been opposed through an affidavit sworn on May 22, 2020 by Douglas Mbilu the Speaker of the County Assembly (4th respondent), in which it was deponed that on May 19, 2020 the 2nd respondent notified the County Assembly of Makueni about the nomination of the 3rd Respondent as County Secretary of Makueni County, and based on recommendations of the County Assembly Public Service Board, the notification was tabled before the County Assembly for consideration, and members of the public were notified of the approval hearings and requested to submit any written statements.



11. It was also deponed in the said affidavit, that on April 1, 2020, the committee on appointments conducted approval hearings, that on April 7, 2020 the committee's report was subjected to debate by the House, and that consequently, the 3rd respondent was nominated for appointment as County Secretary Makueni County Government, and that the 3rd respondent had since been sworn in and assumed office, and further that if dissatisfied, the petitioner should under section 77 of the County Governments Act have filed an appeal to the Public Service Commission of Kenya instead of coming straight to this court, and lastly that the petitioner had failed to demonstrate before this court, how the appointment of the 3rd respondent had affected the residents of the Makueni County.
12. In response to the replying affidavits the petitioner Kennedy Maneno filed supplementary affidavits all of which he swore on June 16, 2020, in which he deposed that the 2nd Respondent in the affidavit sworn on May 11, 2020 had mixed issues herein, and emphasized that the 3rd respondent having previously been the Chairman of the County Public Service Board, the concern was whether his selection as County Secretary was pre-determined.
13. It was also deponed in the said supplementary affidavits that each of the replying affidavits, mixed issues, and did not address the petitioner concerns, and that the petitioner's was not privy to some of the contents of the replying affidavits.
14. The petition was canvassed through filing of written submissions. In this regard, the petitioner's counsel Suyianka Lempaa & Company filed their submissions on June 30, 2020.
15. In their submissions, counsel for the petitioner complained that the 3rd respondent was sworn in swiftly on April 17, 2020 before court orders were issued on April 20, 2020. The counsel identified the issues for determination to be firstly, whether there was a conflict of interest in the recruitment of the 3rd respondent to the position of County Secretary of the Makueni County Government, secondly, whether there was fair competition in the recruitment exercise, thirdly, whether the 1st and 2nd respondents' colluded to nominate the 3rd respondent as the County Secretary, and fourthly, whether the petitioner was entitled to the grant of the orders sought. Counsel contended that the 3rd respondent, having previously served as member of the County Public Service Board, was favoured in the recruitment exercise.
16. On their part, Counsel for 1st and 2nd respondent M/s Gichimu Mungata & Company, filed submissions on October 23, 2020. In their submissions, counsel relied on the replying affidavits of the 1st and 2nd respondents and identified five issues for determination. The issues listed by counsel are firstly, whether this court has jurisdiction to hear and determine the dispute herein, secondly whether the petition herein is competent and whether it demonstrates violation of constitutional and fundamental rights. Thirdly, whether the Petitioner failed to exhaust other available channels for challenging the recruitment process, whether the recruitment and appointment exercise of the 3rd respondent met the requirements set out by Board, fourthly, whether the appointment of the 3rd respondent presented a conflict of interest as alleged by the petitioner and, fifthly and lastly, whether the petitioner has proved his case to the required standards. They maintained in their submissions that this court lacks jurisdiction to hear and determine the petition, that the petitioner did not prove his case to the required standards. Counsel relied on several decided court cases.
17. On their part, counsel for the 4th respondent Mutuku Wambua Associates, filed written submissions on August 5, 2020. Counsel addressed the court on whether this court has jurisdiction to deal with the matter, whether the petition herein is competent, and whether the prayers sought have been overtaken by events, and lastly, whether due process was followed in appointing the 3rd respondent as County Secretary.



18. The 3rd respondent represented by Nyamu & Nyamu advocates did not file written submissions.
19. Having considered the petition, documents filed on behalf of all parties, and the submission of counsel on all sides, I will first of all state that this court has jurisdiction to entertain the present petition, and that the argument that the petitioner should have approached the Public Service Commission of Kenya before coming to this court, cannot be sustained. This is because though there might have been another avenue under the County Government Act for addressing the employment of the 3rd respondent as County Secretary, the question is whether that avenue of appeal, would provide adequate redress herein. In the circumstances of this case and with the injunctive prayers sought herein, I find that this court was the most appropriate forum for the petitioner to file this petition as the Public Service Commission has no mandate to issue injunctive orders, I thus find that this court has jurisdiction to entertain this petition.
20. Arguments have been put in submissions, that this petition has been overtaken by events as the 3rd respondent assumed office and has already left service. With regard to this indeed some prayers like stoppage of the swearing or assumption of office by the 3rd respondent, were overtaken by events, by the time the petition was heard, as the 3rd respondent, had already been sworn in and taken office by the time the petition was ripe for hearing. That was also the reason why the two interlocutory applications filed were marked by the court as dispensed with. Though I am now told that the 3rd respondent has already left office, in my view the prayer seeking a permanent injunction against the 3rd respondent interfering with matters of the County Government of Makueni, and the prayer for costs, are still alive and are thus for determination by this court.
21. Coming now to the main prayer of the petitioner, for issuance of permanent injunctive orders against interference, in my view such prayer for injunctive orders is valid and is under pinned under article 22, and 23(3) (b) of the Constitution, which provides for the issuance of injunctive orders by the court to redress wrongs in constitutional petitions such as the present one.
22. Having stated as above however, I find that the petitioner herein has not satisfied the threshold of proof of violation of his constitutional rights.
23. As was stated in the case of Anarita Karimi Njeru v Attorney General [1979] KLR 54, which was cited in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, a person who alleges a violation of his constitutional rights is obliged to state with precision his complaint, the provisions of the Constitution he considers to have been violated, and the manner in which he believes that his constitutional rights have been infringed. Such precise statement in my view, will help the court to determine whether, from the facts and evidence placed before it, indeed such alleged violation has occurred.
24. In the present case, the petitioner has merely relied on his own personal perceptions that because the 3rd Respondent previously held the position of Chairman of the Makueni County Public Service Board, then his subsequent interview by a newly constituted County Public Service Board, with completely new members, reflected a bias in his favour. No evidence was however, placed before the court to show or demonstrate that indeed there was such favour. On that account his complaint cannot be sustained.
25. Secondly, there is no law or regulation which bars a former Chairman of the County Public Service Board, from being interviewed for the job of County Secretary, after leaving service as happened herein. I thus find that the petitioner did not prove such alleged bias by the Public Service Board in interviewing of the 3rd respondent for the post. The complaint thus fails on that account also.



26. The petitioner also alleges that a person who was unsuccessful in a previous interview for the post of Secretary, was shortlisted for the next interview, which to him was other evidence of bias in favour of the 3rd respondent. In my view, that cannot be evidence of bias either in favour of the 3rd respondent or in favour of anybody else as there is no evidence, that the previous unsuccessful applicant, was not qualified to re-apply for the job. In my view, an unsuccessful applicant for a job can re-apply for the same job as many times as he or she wishes, and may validly be shortlisted and interviewed. Such candidate may also perform better or worse than the previous interview, but that is not evidence of bias nor a constitutional violation.
27. I thus find that the petitioner has not proved to the required standards, his alleged violation of constitutional rights. The petition is thus unmerited and is for dismissal.
28. As for costs, this matter being in the nature of public interest litigation, I order that parties bear their respective costs of the proceedings.
29. The final orders of the court are thus that the petition herein is dismissed. Parties will bear their respective costs of the proceedings.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MAKUENI THIS 10TH AUGUST, 2022

GEORGE DULU

JUDGE

