



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CONSTITUTIONAL PETITION NO. 9 OF 2020**

**MASUD FARAH BILLE.....1<sup>ST</sup> PETITIONER**

**SALAH DUBAT SIGAT.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**THE CABINET SECRETARY, MINISTRY OF INTERIOR**

**AND COORDINATION OF NATIONAL GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**COUNTY COMMISSIONER GARISSA COUNTY.....2<sup>ND</sup> RESPONDENT**

**DEPUTY COUNTY COMMISSIONER, LAGDERA.....3<sup>RD</sup> RESPONDENT**

**ABDIRAHMAN MAKAHIL RASHID.....4<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction**

1. Before me, for determination is the Petitioner/Applicant's Notice of Motion Application dated 2<sup>nd</sup> July, 2020, supported by the affidavit of Masud Farah Bille and Salah Dubat Sigat, it seeks the following orders:

**a) That this application be certified extremely urgent and be heard on priority basis in the first instance:**

**b) That this Honourable Court be pleased to issue a temporary conservatory order prohibiting the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents whether by themselves and or their offices, agents, servants or anybody acting under them from admitting the 4<sup>th</sup> Respondent to the office of Chief II Gurufa Location pending the inter-partes hearing and determination of this application and thereafter as the court shall order.**

**c) That this Honourable Court be pleased to issue a temporary conservatory order prohibiting the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents whether by themselves and or their offices, agents, servants or anybody acting under them from admitting the 4<sup>th</sup> Respondent to the office of Chief II Gurufa Location pending the inter-partes hearing and determination of this Petition and thereafter as the court shall order.**

**d) Costs of this application.**

2. In response to the application, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents filed grounds of opposition dated 28<sup>th</sup> July, 2020 and a Replying Affidavit sworn by Philip Koima, the Deputy County Commissioner, Lagdera on 20<sup>th</sup> July, 2020.

3. Both parties filed their respective submissions. The petitioners filed their written submissions dated 14<sup>th</sup> September, 2020. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents filed written submissions dated 17<sup>th</sup> August, 2020 and a further written submission dated 21<sup>st</sup> September, 2020.

**Background**

## **The applicants/petitioner's case**

4. It is the petitioners case that the Ministry of Interior and Coordination advertised for the position of Chief II Gurufa Location on 14.10.2019 vide a notice of advertisement, where the mandatory qualification for the position were that one must not be less than 30 years of age, have a minimum of C plain in the Kenya Certificate of Secondary Education(KCSE) and be a resident of Gurufa Location.

5. They contend that they applied and were shortlisted for the above position, however, on 26<sup>th</sup> June, 2020 they discovered that the 4<sup>th</sup> Respondent had been appointed to the said position despite not meeting the above mandatory requirements. They aver that from the 4<sup>th</sup> Respondent identity card, he is 28-year-old, he is not a resident of Gurufa Location and that he scored a D plus in his Kenya Certificate of Secondary Education.

6. This they aver should have led to his disqualification and that his appointment is a barrier to a vital Constitutional right of the people of Gurufa Location as captured under Article 56 (c) of the Constitution, as it amounts to taking opportunities from marginalized people given that the requirements served as an affirmative action.

7. They aver that the entire recruitment process was compromised as it lacked fairness, transparency, openness and equality and should be nullified.

## **Respondents case**

8. The Respondents opposed the applicant's petitioner's application. They averred that they advertised for the position of Chief II Gurufa Location, where a13 applicants applied and four were shortlisted including the 4<sup>th</sup> Respondent, whom they aver comes from Gurufa Location contrary to the Petitioners claim.

9. They aver that after scrutinizing the shortlisted candidates they settled on the 4<sup>th</sup> Respondents as the most qualified and recommended his employment despite not meeting the set mandatory requirements being the age, KCSE grade based on the Public Service Commission Human Resource Policies and Procedures dated may, 2016 which urges considerations such as fair competition and merit, adequate and equal opportunities to all gender and youth.

10. And that they further relied in the Public Service Commission Circular REF.PSC/1/67 dated 12<sup>th</sup> June, 2014 which granted waiver to the North Eastern Region on the requirements of the scheme of service allowing ministry to recruit persons to the position of chief so long as they have sat for KCPE irrespective of grades attained.

11. It is their case that the recruitment of the 4<sup>th</sup> Respondent was within the law, and with integrity, fairness, accountability and transparency and that the 4<sup>th</sup> Respondent is a resident of Gurufa Location.

12. Further, they aver that the applicant are guilty of material non-disclosure as they failed to notify the court that there is a similar suit filed at the Chief Magistrate Court being Employment Court Cause No. 2 of 2020 Abdirazak Abdullahi Sirgat vs The Deputy County Commissioner Lagdera Sub-County and 6 Others seeking similar temporary orders and challenging the recruitment of the 4<sup>th</sup> Respondent herein. They aver that the petitioners herein are forum shopping. It is thus their case that the instant application lacks merit and ought to be dismissed with costs.

## **Submissions**

13. Vide their written submissions, the petitioners identified four issues for determination, which they addressed. The first issue is whether this court has the jurisdiction to hear and determine the instant application. In this regard they submitted that the instant petition and application has been filed under Article 22 and 23 of the Constitution and Rule 4 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

14. The said provision gives the High Court the jurisdiction under Article 165 of the Constitution to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights. It is therefore their position that this court has the authority and jurisdiction to hear this matter.

15. The second issue addressed by the applicants is whether the 4<sup>th</sup> respondent is qualified to serve as the chief II Gurufa location, and in this regard they submitted that the 4<sup>th</sup> Respondent does not meet the requirements explained above, which were mandatory and therefore does not deserve to be the chief of Gurufa Location.

16. The Third issue addressed by the applicants is whether the recruitment of the 4<sup>th</sup> Respondent violated the Constitution, and in this respect they submitted that the recruitment exercise herein was not transparent and accountable as required under Article 10, 73, 232 and 249 of the Constitution, it violated the section 22 of the Public Officer Ethics Act, 2003 and section 36 of the Public Service Commission Act, 2017.

17. They rely in the cases of **Diana Kethi Kilonzo & Another vs Independent Electoral & Boundaries Commission & 10 Others (2013)Eklr** and **Richard Bwongo Birir vs Narok County Government & 2 others(2014)eKLR**

18. The final issue addressed by the applicants petitioners is on whether the Petition/Application herein is similar to the Employment Cause No. 2 of 2020 Abdirazak Abdullahi Sigat vs Deputy County Commissioner, Lagdera sub-county and 6 others. In this regard it is their submissions that the petitioners herein are different from the claimant in cause no. 2 of 2020, and that their claim is an employment claim

whereas theirs is a petition.

19. On resjudicata, they submitted the matter is not resjudicata and neither is it subjudice. They rely in the cases of **Independent Electoral and Boundaries Commission vs Maina Kia & 5 Others, Nairobi CA Civil Appeal No. 105 of 2017** and **Nairobi High Court Constitutional Petition No. 331 of 2016, Katiba Institute and Africa Center for Open Governance vs the Attorney general and the Public Service Commission.**

20. The Respondents vide their submissions and further submissions addressed the following issues in opposition to the instant application. They first addressed the issue of Jurisdiction where they submitted that the suit fails under the subjudice rule.

21. Reason being that, there is a pending similar suit before the Chief Magistrate Court at Garissa, that is Cause No. 2 of 2020 Abdirazak Abdullahi Sigat vs The Deputy County Commissioner- Lagdera & 6 Others, which basically is on the same issues sought to be addressed herein, thus it exposes the court to risk of embarrassment. They rely in the case of **ASL Credit Limited vs Abdi Basid Sheikh & Another (2019) eKlr.**

22. In addition, they submit that this court lacks the jurisdiction to deal with the matter as the issue in question relates to employment which falls within the jurisdiction the Employment and Labour Court established under Article 162(2)(b) of the Constitution and section 12 of the Labour Relations Act, which Court has the status similar to that of the High Court and Jurisdiction to address issues of violation of the Constitution that arise and incidental to the matter.

23. In this regard they rely in the Court of Appeal decision in **Daniel N. Mugendi vs Kenyatta University & 3 Others (2013) eKlr, United States International University (USIU) vs Attorney General (2012) Eklr** and the Supreme Court Decision in **Samuel Kmau Macharia & Another vs Kenya Commercial BANK Limited & 2 Others (2012) Eklr.**

24. The other issue addressed by the Respondents is on whether the petitioners have met the threshold for granting conservatory orders. In this regard they submitted that applicants have failed to establish a prima facie case with probability of success as they have failed to demonstrate any apparent right that has been infringed as was held in **Mrao Ltd vs First America Bank of Kenya Ltd & 2 others (2013) eKlr.**

25. In addition, they submit that the circular waiving the qualification for chiefs in North eastern and the existing cause No. of 2020 relating to the instant petitions points out to the fact that the application lacks merit and that there is no prejudice to be suffered if the instant application is dismissed. In this they rely in the case of **Simeon kioko Kitheka & 18 others vs County Government of Machakos & 2 others (2018)Eklr.** In sum they urged the court to dismiss the instant application.

#### **Determination**

26. After considering the pleadings and analyzing the evidence and submissions presented before this Court. It is clear that the jurisdiction of this court has been challenged. It is trite that where the jurisdiction of the court is put to question, the court is required to first deal with the issue of jurisdiction before proceeding with other issues raised. This was captured by **Nyarangi, JA in the case of Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** while citing *Words and Phrases Legally Defined* – Vol. 3: 1-N page 13 held

**“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.**

27. Consequently, this court is to first deal with the issue of Jurisdiction since without jurisdiction it has no option but to lay down my tools.

28. Article 162(2)(a) of the Constitution, parliament is empowered to establish a court with the same status as the High Court to hear and determine disputes relating to employment and labour relations. Consequently, the Employment and Labour Relations Court Act were established with equal status with this court to handle employment and labour relations matters.

29. Section 12 (1) (a) of the Employment and labour Relations Act, grants the Employment and Labour Court exclusive original and appellate jurisdiction to hear and determine all disputes relating to or arising out of employment between an employer and an employee.

30. The Court in **Abdikadir Suleiman vs. County Government of Isiolo & Another [2015] eKLR** held-

**“...The original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests with this court as vested with the appropriate jurisdiction under Articles 159(1), 162 (2) (a) as read with Article 165(5) and (6) of the Constitution; Articles 22(1) and 258(1) of the Constitution, and the provisions of the Employment and Labour Relations Act, 2011. The court holds that the jurisdiction spreads to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under Article 22 of the Constitution and enforcement of the Constitution under Article 258 as far as the issues in dispute are, evolve, revolve or relate to employment and labour relations. The court holds that the compass or golden test for the court's jurisdiction is the subject matter in the dispute namely disputes relating to employment and labour relations as provided for Article 162 (a) of the Constitution and as amplified in the Employment and Labour Relations Court Act, 2011 and not the remedies sought or the procedure of moving the court or the situ of the applicable law or any other extraneous considerations as may be advanced by or for a litigant.”**

31. Articles 22(2)(c) and 258(2)(c) of the Constitution provide that court proceedings may be instituted by a person acting in the public

interest where a person's right or fundamental freedom in the Bill of Rights has been violated or denied or where the Constitution has been contravened or threatened with contravention. The applicants have petitioned this court pursuant to the above provisions of the Constitution.

32. It is clear from the foregoing that the Employment and Labour Court as created under Article 162(2) (a) of the Constitution is bestowed with the jurisdiction to deal with matters that arise from employment and labour related and as held by the Court appeal in in **Daniel N. Mugendi vs Kenyatta University & 3 Others(supra)** and in **Abdikadir Suleiman vs. County Government of Isiolo & Another(supra)** it has the jurisdiction to deal with issues of violation of the fundamental rights in the Constitution that are incidental thereto.

33. The applicant's petitioners' issues herein relate to the alleged employment of the 4<sup>th</sup> Respondents by the Respondents, which they allege was undertaken outside the law and violated the Constitution. It is apparent to this court that the same fall within the jurisdiction of the Employment and Labour Court, and therefore this court based on the foregoing lacks the jurisdiction to deal with the matter.

### **Conclusion**

In view of the foregoing, this court finds that it lacks the jurisdiction herein and thus court makes the following orders;

**i) The court therefore strikes out the instant application and Petition with no orders as to costs.**

**ii) Interim orders are hereby set aside and discharged accordingly.**

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 28<sup>TH</sup> DAY OF OCTOBER, 2020.**

.....

**C. KARIUKI**

**JUDGE**