



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 5 OF 2017**

**IN THE MATTER OF ARTICLES 10, 22, 23, 27, 28, 41, 47, 165(3)(a) & (b), 232, 258 & 259 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF ENFORCEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER CHAPTER 4 ARTICLES 22 AND 23(1) & (3), ARTICLE 47 AND CHAPTER 10 ARTICLE 165(3)(b), ARTICLE 174 OF THE CONSTITUTION OF KENYA, LN 133 OF 2001 CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL, PRACTICE AND PROCEDURE RULES)**

**AND**

**IN THE MATTER OF SECTION 4 & 5 OF THE FAIR ADMINISTRATIVE ACTION ACT**

**IN THE MATTER OF SECTION 59, 60 & 65 OF THE COUNTY GOVERNMENTS ACT**

**IN THE MATTER OF THE ALLEGED THREATENED & CONTRAVENTION OF SECTIONS 4 & 5 OF THE FAIR ADMINISTRATIVE ACTION, SECTIONS 60 OF THE COUNTY GOVERNMENTS ACT & THE NATIONAL VALUES & PRINCIPLES OF NATIONAL GOVERNANCE UNDER ARTICLE 10 & 232 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE RECRUITMENT OF THE HOSPITAL ADMINISTRATIVE OFFICER OF KITUI REFERRAL HOSPITAL BY THE KITUI COUNTY PUBLIC SERVICE BOARD & THE COUNTY GOVERNMENT OF KITUI**

**BETWEEN**

**BONIFACE YOANA KIMWELE.....PETITIONER/APPLICANT**

**VERSUS**

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

**THE COUNTY GOVERNMENT OF KITUI.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

1. **Boniface Yoana Kimwele**, approached this Court by way a Constitutional Petition dated the 27<sup>th</sup> day of **June, 2017** seeking various orders.
2. The gist of the matter is that the Respondents advertised in the Standard Newspaper of 26<sup>th</sup> **May, 2017** a vacancy for one (1) post of Hospital Administrative Officer, Job Group 'R'. In the County's Ministry of Health and Sanitation and invited applications from suitable and qualified persons for consideration.
3. His argument is that the Respondents failed to engage the general public and other relevant stakeholders including the County's Medical and Health Officers/Practitioners before creating and advertising the post, an act that is unlawful, regular, null and void and in contravention of **Article 47** of the **Constitution**.

4. Therefore he sought *inter alia* an order quashing the advertisement and all subsequent actions taken thereafter and an order prohibiting the Respondents from conducting any further process of recruitment and appointment of any person for the advertised position.

5. Also filed with the Petition is a Notice of Motion seeking injunctive and conservatory orders to issue against the Respondents halting the exercise and preserving the prevailing status quo.

6. The Respondents filed a Notice of Preliminary Objection dated 12<sup>th</sup> July, 2017 on a point of law and grounds that:

(i) The Court lacks jurisdiction to hear and determine the Petition by dint of **Article 165(5)(b)** as read with **Article 162(2)(a)** of the **Constitution of Kenya, 2010** and **Section 4** and **12** of the **Employment and Labour Relations Court Act, Cap 234B** of the **Laws of Kenya**.

(ii) The Petition is an abuse of Court process as the Petitioner has failed to set out with reasonable precision his complaint, the specific provisions of the Constitution violated and the manner of the alleged infringement.

7. The Petitioner/Applicant filed grounds of opposition to the Preliminary Objection raised where he stated that this Court has jurisdiction to entertain the Petition as provided by **Articles 22, 23, 165(3)(a) & (b), 232, 258** and **259** of the **Constitution of Kenya, 2010** and that the relationship between the Applicants for the advertised post and the Respondents cannot be described as falling under the category of employer/employee.

8. In his submissions on a question of jurisdiction, **Mr. Obura**, Counsel for the Respondent pointed out that the Petition is premature as the matter should have been referred to the Public Service Commission as recognized by the Constitution.

9. That the Petition challenges the process of recruitment and qualifications that were given in the advertisement. It questions the relationship the person to be recruited will have with existing employers. All the Petitioner who says that he is aggrieved as a beneficiary is asking the Court to prohibit the Respondents from employing. This, therefore is a dispute regarding employment. It touches on employment, a dispute that should be settled by the Special Court. He cited the case of **Kenya National Parents Association vs. Cabinet Secretary, Ministry of Education Science & Technology & Another (2015) eKLR** where the Employment and Labour Relations Court stated that matters of recruitment of employees, termination of employment whatever means, constructive dismissal/termination as well fall under the provisions of the Court's jurisdiction.

10. In response, **Mr. Atonga**, learned Counsel for the Petitioner opposed the application. On jurisdiction, he argued that the application is filed pursuant to the provision of **Article 23(1)** of the **Constitution**. That this Court has unlimited jurisdiction in Civil matters and where a right has been infringed the Court has jurisdiction. That the Respondents have created an office that is a duplicity of Medical Superintendent in violation of **Section 60** of the **County Government Act**.

11. Further, he submitted that **Section 2** of the **Employment and Labour Relations Court Act** interprets an employer as a person who has entered into a contract of employment and the Applicant has no control over the Respondent. That the Applicant cannot be categorized as an employee of the Respondents per **Section 12** of the **Employment and Labour Relations Court Act**. That the issue of referring the matter to arbitration pursuant to the provisions of **Section 77** of the **County Government Act** is an afterthought that should be disregarded.

12. The jurisprudence regarding principles regarding Preliminary Objection were set out in the case of **Mukisa Biscuit Manufacturing Co. LTD vs. West End Distributers** where the Court held thus:

*“a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit..... A preliminary objection .....raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should go.”*

13. Regarding the issue of jurisdiction, a question has been posed by the Respondents whether this Court has the power to make any legal decision in respect of this case. In the case of **The Owners of Motor-vessel “Lillian S” vs. Caltex Oil (K) LTD (1989) KLR I** the Court stated thus:

*“where a court has no jurisdiction there would be no basis for a continuation of the proceedings – 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.”*

14. In the case of **Samuel Kamau Macharia vs. Kenya Commercial Bank LTD & 2 Others (2012) eKLR** the Supreme Court stated thus:

*“A court's jurisdiction flows from either the constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred to it by the constitution or written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law..... the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the court cannot entertain the proceedings.”*

15. **Article 165(3)(a)** of the **Constitution** grants this Court unlimited original jurisdiction in Civil matters. It has jurisdiction to determine an issue where it is alleged that a right has been infringed. However, **Article 165(5)(b)** precludes the High Court from hearing matters that are specified in **Article 162(2)**. Of interest in this case are matters that are a preserve for the **Employment and Labour Relations Court**.

16. The Respondents herein expressed their intention to employ individuals in various capacities by advertising in the Standard Daily Newspaper of **Friday, May 26<sup>th</sup>, 2017** vacancies for various positions. Among them was the position of Hospital Administrative Officer, Job Group 'R'. The instant Petition challenges the process of inviting various Applicants to put in their respective applications in order to be shortlisted and eventually interviewed for purposes of being employed by prospective employers, the Respondents herein.

17. The jurisdiction of the **Employment and Labour Relations Court** is provided for in **Section 12** of the **Employment and Labour Relations Court Act** which stipulates thus:

*“(1) The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this act and any other written law which extends jurisdiction to the court relating to Employment and Labour Relations. (Emphasis mine).....*

*(2) ..... A claim or complaint may be lodged with the court by or against an ..... employer.....”*

18. At the point of advertising the position the Respondents were prospective employers. The Petitioner was aggrieved because, according to him, though not a prospective Applicant for the advertised position he has keen interest in developments at the hospital especially delivery of health and medical services to the public. He complains of the intended recruitment. He argues that if the vacant post that is created is filled there will be antagonism between employees of the Respondents. Further he questions the qualifications and the responsibilities to be performed by the individual which are labour related issues.

19. The **Employment and Labour Relations Court** was confronted with such a situation in **Cause No. 1549 of 2015, Kenya National Parents Association vs. Cabinet Secretary, Ministry of Education Science & Technology & Another** where **Mbaru J.** had this to state:

*“..... Thus the issues in dispute and the orders sought relate to employment and labour relations, matters directly under the jurisdiction of the court. Matters of recruitment of employees, termination of employment through whatever means ..... fall under the purview of this court jurisdiction.”*

20. In the case of **Trusted Society of Human Rights Alliance vs. Nakuru Water and Sanitation Service Company and Another (2013) eKLR Ongaya J.** stated thus:

*“The court has considered the provision and finds that under the section, parties to proceedings before the court are not limited to those in an employee-employer relationship. In particular, under section 12(2) of the Act, any person can bring before the court a case against an employer, employee ..... or any office established under any written law. The court finds that the court has jurisdiction under section 12(2) because the petitioner not being in an employer-employee relationship with the Respondent, the respondent has been moved against in its capacity as an employer. As relates to jurisdiction by subject matter, Article 162(2) (a) of the Constitution and Section 12(1) are elaborate that jurisdiction attaches to this court with respect to disputes relating to employment and labour relations. In the instant case, the dispute is about recruitment process undertaken by the respondent. The court finds that recruitment is a proper element of employment and therefore the court has jurisdiction in view of that subject matter.”*

21. It is argued by the Petitioner's learned Counsel, **Mr. Atonga** that the Petition raises questions of infringement of rights guaranteed in **Article 23, 27, 43** of the **Constitution**. There is violation of **Article 10** and **232** of the **Constitution of Kenya, 2010**. And the Court with unlimited jurisdiction of determining such constitutional issues is the High Court.

22. **Section 12(3)** of the **Employment and Labour Relations Act** provides that:

*“In exercise of its jurisdiction under this Act, the court shall have power to make the following orders:-*

*(i) Interim preservation orders including injunction in cases of urgency;*

*(ii) A prohibitory order*

*(iii) .....*

*(iv) A declaratory order.....”*

23. In the **Trusted Society of Human Rights Alliance Case (Supra)** the Court continued to state that:

*“As for jurisdiction based on remedy, the court finds that the Petitioner has substantially prayed for declarations which are remedies the court is authorized to make under Section 12(3)(iv) of the Act. Thus the court has jurisdiction on that account. ....the court holds that it is vested with constitutional jurisdiction to protect the constitution under Article 258 and to enforce the Bill Rights in disputes relating to employment and labour relations pursuant to provisions of Article 22(3) as read with Article 23 and 165(3)(b) of the Constitution....”*

24. It is pleaded that the Respondent violated **Section 60(1)(e)** of the **County Government Act** by creating the office. In the case of **Daniel N. Mugendi vs. Kenyatta University & 3 Others (2013) eKLR** the Court of Appeal citing the case of **Alphonse Mwangemi Munga & Others vs. African Safari Club LTD (2008) eKLR** stated that the Judge was persuaded that the Constitution had to be read together with

other laws made by Parliament. It should not be so construed as to be disruptive of other laws in the administration of justice and that accordingly parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the Constitutional Court and making constitutional issues of what is not. With all the foregoing, the learned Judge concluded that the claim placed before her by the Appellant was based on employment – a matter that should have instead been taken to the Industrial Court which had Constitutional and Statutory Jurisdiction over such matters and not the High Court in the form of a constitutional reference.

25. The Court of Appeal in **County Public Service Board & Another vs. Hulbhai Gedi Abdille (2017) eKLR** was of the view that:

*“..... There is no doubt that the respondent initiated judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the Act. The Section provides not only a forum through which the respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one, specifically tailored by the legislators to meet needs such as the respondent’s. In our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance.”*

26. The Petitioner herein is alive to the fact that what was purportedly violated is a provision of the law where an aggrieved party has the discretion to appeal to the Public Service Commission which is mandated to address the complaint raised by him. **(See Section 77 of the County Government Act.)** It should have explored that avenue.

27. From the foregoing I find the Preliminary Objection raised having merit and is upheld. The Petition filed herein and the Notice of Motion are struck out with costs to the Respondents.

28. It is so ordered.

**Dated, Signed and Delivered at Kitui this 15<sup>th</sup> day of February, 2018.**

**L. N. MUTENDE**

**JUDGE**