



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CONSTITUTIONAL PETITION No. 1 of 2018

IN THE MATTER OF IN THE MATTER OF ARTICLES 2, 3, 10,

23,159 AND 232 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 57, 58 AND 59 OF THE COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF USURPTION OF THE FUNCTIONS AND INTERFERENCE

WITH THE OPERATIONS OF THE COUNTY PUBLIC SERVICE BOARD BY

THE COUNTY PUBLIC SERVICE BOARD BY THE COUNTY SECRETARY

OF KISUMU AND IN THE MATTER OF ABUSE OF OFFICE

BETWEEN

COUNTY PUBLIC SERVICE

BOARD OF KISUMU.....PETITIONER

VERSUS

DR.OLANG'O ONUDI (Ag. County

Secretary Kisumu County)...1ST RESPONDENT

COUNTY GOVERNMENT OF KISUMU.....2ND RESPONDENT

RULING

Background

1.Sometimes in 2017, the petitioner put an advertisement in the local dailies calling for applicants to fill the positions of CITY BOARD MEMBERS.

2. That sometimes on 24th January, 2018 while the petitioner was in the course of processing the received applications, the respondents put up an advertisement in the local dailies inviting applications for the same positions that were earlier advertised by the petitioner and for which shortlisting is going on.

Applicant/Petitioners' Case

3. The petitioner’s main grievance is that the respondents are violating the law by attempting to recruit members of the City Board whose that mandate lies with the petitioner. Mr. Nyamweya for the applicant submitted that respondents’ actions of advertising for positions similar to the ones advertised by the petitioner contravenes the provisions of Articles 2, 3, 10, 232 of the Constitution and Section 59 of the **County Government Act**. In addition, he submitted that the respondents have abrogated the constitutional principle of efficient, effective and economic use of resources as enshrined in Article 232 (1) (d) of the Constitution.

4. By an application dated 18th February, 2018, brought under Article 23 (1) and (3), 159 and all enabling provisions of the law, the Petitioners therefore seek the following orders.

1. Pending the hearing and determination of the Petition, a conservatory order do issue restraining the 1st respondent from receiving and processing applications for positions advertised in the STANDARD NEWSPAPER OF 24TH JANUARY, 2018 at page 13.
2. Costs be in the cause

Respondents’ case

5. The respondent’s response is contained in an affidavit sworn by the 1st respondent on 6th February, 2018. Mr. Obondi for the respondents submitted that while Section 59 of the **County Government Act** provides for appointment of staff of the City Board by the petitioner, appointment of members of the Boards lies with the County Executive Committee under Section 13 (1) of the **Urban Areas and Cities Act**. On that basis, he submitted that the advertisement by the petitioner is null and void.

Analysis and Determination

6. I have considered the notice of motion in the light of the affidavits on record, annexures thereto as well as oral submissions made for each of the parties.

7. There are a myriad of cases on the guiding principles for the granting of conservatory orders. In the case of **Centre For Rights Education and Awareness (CREAW) & 7 Others, Petition No. 16 of 2011, Nairobi** Musinga, J (as he then was) stated that:

“..... a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

8. In the case of **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**, it was held by a majority as follows:

“In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission.”

9. The Supreme Court in **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others, S.C. Application No. 5 of 2014**, held as follows at paragraph 86:

“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest.

The application revolves around who between the petitioner and the respondents has the legal authority to recruit for the positions of City Board Members.

8. The **Urban Areas and Cities Act** and the **County Government Act** regulate recruitment of persons to serve in the Counties. For purposes of clarity, Section 12 of the **Urban Areas and Cities Act** states as follows:

(1) The management of a city and municipality shall be vested in the county government and administered on its behalf by—

(a) A board constituted in accordance with section 13 or 14 of this Act;

(b).....

9. Section 13 of the Act which is relevant to this petition provides for the number of members of the board and for their recruitment through competitive process, by the county executive committee, with the approval of the county assembly.

9. On the other hand, Section 59 of the **County Government Act** states as follows:

(1)ThefunctionsoftheCountyPublicServiceBoardshallbe,onbehalfofthe county government, to—

(a)

(b)Appointpersonstoholdoractinofficesofthecountypublicservice includingintheBoardsofcitiesandurbanareaswithinthecountyand to confirm appointments;

10. My foregoing holding is buttressed by Section 49 of the **County Government Act** which provides that the structures and functions of urban areas and cities shall be as is provided for in the Urban Areas and Cities Act (No. 13 of 2011).

11. Section 49 of the **County Government Act** was in my humble view not incorporated in the Act in vain but was intended to ensure that there was precision in the functions of various players in the management of cities and municipalities.

12. A reading of Section 13 of the **Urban Areas and Cities Act** leaves no doubt in the mind of the court that members of a City Board are to be appointed by the respondent and not by the petitioner. The petitioner's mandate to appoint **persons to hold or act in offices of the county public service including in the Boards** (*emphasis mine*) does not in my considered view include or contemplate appointment of Board Members and any contrary interpretation is a misapprehension of the law.

13. Having found that the petitioner does not have the mandate to recruit members of a City Board, I hold that the petitioner acted in excess of its legal power and authority when it placed an advertisement in the local dailies calling for applicants to fill the positions of City Board Members.

13. The petitioner's submission that the respondent ought to have cancelled the advertisement placed by the petitioner prior to putting up an advertisement inviting applications for the same positions that were earlier advertised by the petitioner, has no backing in law and the respondent was in any case not obliged to do so.

14. Having said that, I also find and hold that the shortlisting and processing of applications for members of the City Board that the petitioner is undertaking is in my humble view of no consequence since the advertisement for the said positions was *null and void ab initio*.

Economic use of resources

15. Articles 201 and 232 (1) (b) mandate the petitioner and the respondents among other institutions and persons that manage public finances to ensure efficient, effective and economic use of resources. I have no doubt that petitioner's action of placing an advertisement in the local dailies calling for applicants to fill the positions of City Board Members, which is outside its legal power and authority was not only a violation of the constitutional but also an imprudent way of expending public funds.

Conclusion

16. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008**, it is the responsibility of the Court to uphold the rule of law and to ensure that executive action, that Parliament intended, is exercised.

17. The Supreme Court in **Gatirau Peter Munya vs. Dickson Mwenda Githinji & 2 Others SCK Application No. 5 of 2014** held that public interest ought to be considered by the court before granting conservatory. In the light of this case, public interest does not favor the granting of conservatory orders for to do so would amount to countenance behaviour that threatens the rule of law.

18. In the end, I have come to the conclusion that other than the fact that the petitioner blatantly violated clear provisions of the Constitution and the law, the petitioner's application dated 18th February, 2018 does not disclose a *prima facie* case, and, public interest and maintenance of the rule of law are therefore not in favor of granting a conservatory order. The application dated 18th February 2018 is therefore hereby dismissed with no order as to costs.

DATED AND DELIVERED THIS 15th DAY OF February 2018

T.W. CHERERE

JUDGE

Delivered in open court in the presence of-

Court Assistants - Felix & Carolyne

For the Applicant/Petitioner - N/A

For the Respondents - Mr. Obondi