



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. 5 OF 2018

IN THE MATTER OF THE PUBLIC PROCUREMENT & DISPOSAL ACT NO. 3 OF 2008

AND

IN THE MATTER OF THE PUBLIC PROCUREMENT & DISPOSAL REGULATIONS 2006

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLE 27 AND 227(2) OF THE CONSTITUTION**

AND

IN THE MATTER OF SECTION 45 OF THE COUNTY GOVERNMENT ACT NO.17 OF 2012

MOHAMMED JILLO ROBA.....1ST PETITIONER

ABDINOOR ABDULLAHI JIRMA.....2ND PETITIONER

ON THEIR OWN BEHALF & ON BEHALF OF THE PUBLIC

-VS-

ISIOLO COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

ISIOLO COUNTY2ND RESPONDENT

RULING

1. By a Motion on Notice dated 21st February, 2018, the Petitioners moved the court under **Order 40 Rules 1, 2 & 3 of the Civil Procedure Rules, and Regulation 31 of the Public Procurement and Disposal (Preference and Reservations) Act 2005** for an order restraining the 1st Respondent from employing candidates announced on Angaf FM Radio in Isiolo County on 13th February, 2018 pending the hearing and determination of this petition. The petitioners also sought an order to restrain the Isiolo County Assembly from vetting the said persons.
2. The grounds upon which the Motion was grounded were set out in the body of the Motion and in the affidavit sworn by Mohamed Jillo Roba sworn on 21st February 2018. These were; that the employment of the persons announced in the Angaf FM Radio in Isiolo was in blatant breach of **Articles 27 and 227 (20) (b) (sic) of the Constitution of Kenya**; that although the petitioners had applied and shortlisted for interview, they were discriminated upon; that the alleged persons had been irregularly appointed and that there was regional imbalance in the said appointments.
3. In the supporting affidavit, it was deposed that the petitioners had applied, been shortlisted and interviewed for the posts of County Chief Officer for Gender, Culture and Social Services and for Tourism and Wildlife Management; that subsequently, there was a second advertisement for the same positions using different phraseologies from the first advertisement. However, that advertisement did not indicate whether the interviewees of the 1st advertisement were required to reapply or not.

4. It was further contended that, none of the candidates who got appointed from both advertisements were appointed in line with the respective departments they had applied for; that others who had not been shortlisted for the interview were appointed. There were also allegations of nepotism and regional imbalance in the said appointments. Consequently, the deponent concluded that the requisite procedures and due process were not followed in carrying out the exercise.

5. The application was opposed vide a replying affidavit sworn on 15th March, 2018 by Dr. Ahmed Galgalo, the County Secretary/Head of Public Service of the County Government of Isiolo. He deponed that the 1st Respondent settled on the successful candidates after a rigorous exercise; that the orders sought against the County Assembly cannot be granted as the County Assembly is not a party to the proceedings and that the County Assembly had been satisfied with the professional qualification and the diversity of the communities living in Isiolo.

6. He further deponed that the public service board has discretion to re-advertise any position where no one has qualified and as well as re-assign candidates to positions it felt candidates were more suited. That for effective functioning of the county government, the chief officers must be in office lest service delivery to the people of the County of Isiolo be affected. He concluded that the orders sought had in any event been overtaken as the candidates had already been appointed, taken oath of office and were already working.

7. I have carefully considered the application, the affidavits and the law.

8. The principles applicable in an application for grant of a temporary injunction were settled in the case of **Giella v Cassman Brown [1973] EA 358**. These are that, an applicant must establish a prima facie case with a probability of success, that an interlocutory injunction will not normally be issued unless the applicant will suffer **injury which would not adequately be compensated by an award of damages and that if the court is in doubt, it will decide the application on the balance of convenience.**

9. The meaning of prima facie case was defined in the case of **Mrao v First American Bank of Kenya Limited & 2 Others [2003] eKLR** where the court held:-

“So what is a prima facie case I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

10. I have carefully looked at the Petition. It is seriously wanting in its drafting and presentation. First, this court entertains doubt if the petition can qualify as a constitutional petition made pursuant to the bill of rights under our Constitution. It fell far short of what is required of a constitutional petition made under the bill of rights. The petition did not precisely set out the rights under the Bill of Rights that had been breached and if so, how they had been breached.

11. In **National Super Alliance (Nasa) Kenya v. Independent Electoral & Boundaries Commission & 2 Others [2017] eKLR** the court held:-

“The principles governing the precision with which a constitutional petition should be pleaded were well stated in Anarita Karimi Njeru v. Republic High Court Nairobi Misc. Crim. Appl. 4 of 1976 [1979] eKLR. The petitioner should specifically set out the provisions of the Constitution that are alleged to have been violated; provide the particulars of the alleged violation and how the respondent has violated those rights. This position has been reiterated in Martin Nyaga Wambora & Others v. Speaker of the Senate & 6 Others High Court, Kerugoya Petition 3 of 2014 [2014] eKLR and Mumo Matemu v. Trusted Society of Human Rights Alliance & Others Court of Appeal, Nairobi, Civil Appeal 290 of 2012[2013] eKLR”.

12. In the present case, the petitioners only cited *Articles 27 and 227(2) of the Constitution on the title of the petition*. Nowhere in the body of the petition is there any article or right pleaded or how the same had been infringed by the respondents. The petition is a meagre 9 paragraph pleading which states; the particulars of the parties; that there was an advertisement for positions in which the petitioners were shortlisted for interview; that a subsequent advertisement was unprocedurally placed out of which those shortlisted were interviewed and not appointed to positions they applied for and that there is rampant nepotism and regional imbalance in the whole exercise. Then the petition prayed for a declaration that the recruitment made was unconstitutional, null and void.

13. Secondly, notwithstanding that the petition was bare as to the rights allegedly infringed or the nature of the infringement, there was no affidavit setting out the facts in support of the petition. That lacking, this court entertains serious doubts that the petition can be said to have any chances of succeeding.

14. I am aware that vide *Articles 22 and 159 of the Constitution of Kenya*, no technicalities of whatever nature should cripple or prevent the enforcement of the rights under the Bill of Rights, but a court of law cannot act on a bare pleading, such as the petition herein, that is short of the necessary material to act on.

15. Even if the court relies on the affidavit that was sworn in support of the motion, the right that had allegedly been infringed is that the petitioners had been discriminated upon and that the impugned process failed to ensure regional balance. The petitioners did not produce the minutes or report of the performance of the candidates and their scores. There was no evidence that they had applied to be supplied with the same from the Respondents and that it was denied. There was also no evidence of the actual names of those who had been appointed through Angaf FM Radio.

16. Be that as it may, if it be true that there were two advertisements whereby those who were interviewed in the first advertisement were never advised whether they should re-apply or that they were ineligible, a question of opaqueness in the process and therefore transparency arises. The allegation of discrimination cannot be said to be far-fetched. Further, a letter dated 19th February, 2018 by the Minority Leader, Isiolo County Assembly sets out how there was community imbalance in the said hiring.

17. In the case of **John Mining Temoi & Anor. V. Governor of Bungoma County & 17 Others [2014] eKLR** the court held that where there are appointments in a County Government for positions not interviewed and which appointments fail to take into consideration the interests of the marginalised communities those appointments are unconstitutional and cannot be allowed to stand.

18. In the present case, there were allegations of discrimination, nepotism and regional imbalance. The respondents not only failed to effectively deny the particulars of the alleged discrimination, nepotism and regional imbalance but they also failed to give specific evidence to back their response to these specific allegations. In this regard, notwithstanding the hopelessness of the principal pleading, the petition, which I am aware can be amended, I am satisfied that a case has been made that require an answer from the respondent and therefore a prima facie case established.

19. The second issue is whether irreparable damage will be caused that will not likely to be compensated by an award of damages if the injunction is not awarded. The petitioners seek orders to restrain the 1st Respondent from employing the candidates selected, their vetting by the county assembly and consequent employment. From the evidence tendered by the respondents, the said selected candidates have already been vetted and employed. Two issues arise; firstly, the orders have been overtaken by events and secondly, the County Assembly which is sought to be restrained is not a party in these proceedings. Further, the affected candidates were not joined in these proceedings to protect their position.

20. It is trite that a court of law cannot make an order against someone who is not a party to the proceedings before it. That is a principle of law that does not require any authority. In this regard, there can be no irreparable damage where the action sought to be prevented has already taken place and the party against whom the orders is sought is not before court in the main petition.

21. In this regard, I do not need to consider the third limb of the balance of convenience. In any event, even if I was to consider it, it would be against issuing restraining orders as services should continue to be offered to the Isiolo residents while the disputants and/or combatants in this matter sort themselves out in the main petition.

22. Accordingly, I find that the Motion to be without merit and I dismiss the same. The matter raised novel issues of public interest for which therefore I will order each party to bear own costs.

DATED and DELIVERED at Meru this 30th day of May, 2018.

A. MABEYA

JUDGE