



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
JUDICIAL REVIEW NO. 5 OF 2017.
(FORMELY JR NO. 478 OF 2016 H.C. AT NAIROBI)
ISIOLO COUNTY GOVERNMENT.....APPLICANT
VS
ISIOLO COUNTY PUBLIC SERVICE BOARD.....RESPONDENT
JUDGMENT

Application dated 7th October 2016 was filed at the High Court in Nairobi under Certificate of Urgency before Hon Lady Justice Aburili who certified the same urgent and granted leave to apply for Judicial Review orders sought in prayers 2,3,4,5,6 and 9 of the Chamber summons. She further went ahead and said that in view of the serious allegation of procedural impropriety and unconstitutionality of the process, she ordered for stay of deployment of the appointed stay in terms of prayers 7 and 8 of the Chamber summons.

There was an order that substantive motion be filed and served within 21days. From the proceedings before Aburiri J it is indicated parties were attempting out of court settlement between 10th May 2017 and were given upto 31st May 2017 to do so but by 31st May 2017 they had not attempted negotiations as the exparte applicant had not served the Respondents and interested parties with the draft consent for consideration. The trial judge who was to proceed on leave by Mid July 2017 decided to transfer the matter to High court at Meru for highlighting determinations.

In highlighting the submissions on 30th June 2017, Mr Busady for exparte applicant argued that it is admitted the Respondent had mandate under section 57, 59 and 63 to make appointments but that its decision to offer employment vide letters dated 30.09.2014 was tainted with procedural impropriety, unreasonable and bad faith.

It was argued that Section 63(2) of County Government Act mandates Respondent to exercise authority at the request of Relevant county Chief officer of the Department to which appointment was to be made or request of the clerk of county Assembly or on County public service Boards over motion on account of public best interest.

It was submitted that the County Assembly and the County Executive wrote letters – In 2 and 4 suspending the recruitment but the Respondent proceeded with the exercise. An act which was illegal in view of he wording of section 63(2). It was further submitted that forms annexed to Replying Affidavit of Hussein Hugo Wako-HHW(g) to (j) are not duly filled and there is no reason given for recruitment of additional stay. It was said that the forms relate to a financial year different from that which the recruitment took place.

It was argued that the Respondent by law to consider requirement of the Executive and County Assembly when recruiting and both organs expressed themselves to the Respondent to suspend recruitment pending HR Audit Approval of organogram and optimization of funds.

THAT the Respondent decision didn't take into account relevant factors, it was irrational in view of obtaining circumstances. The authority of Associated Provincial Houses Ltd vs Wednesbury company was relied upon among others in the list of authorities for the exparte applicant:-

Mr Kariuki Advocate for the Respondents opposed the Exparte applicants motion by the Replying Affidavit of the CEO of the Respondent sworn on 21st October 2016 and filed on 27th February 2017. It was submitted that none of the grounds cited by Exparte Applicants had been demonstrated. It was argued that the Respondent is already corporated that section 57 of the County Government Act either provides for its independence from interference by either the Executive or County Assembly. It was argued that before the officers named in prayers 1,2 and 3 were recruited there was a request from the relevant Department as provided under Section 63(2) (a) and pursuant to that section and reliance on annexures HHW 1 (a) to (j) undertook the exercise. He said the user departments filled the forms dated 11th August 2015 and minutes of meeting chaired by the County secretary on 31st March 2016 clearly show the user departments requisition for recruitment in the year 2015/2016 and it was resolved the position be filled urgently.

That the County Assembly of Isiolo vide annexure HH3 decried and emphasized the need to have recruitment done forthwith. The County Assembly recommended the recruitment to be done within 60 days. The department of Lands even went ahead vide HH4 to advertise the positions by itself and the County Secretary paid for the advert. HH8 is list of shortlisted candidates and minutes confirming interviews were conducted and letters conferring persons who were successful.

That it was after confirmation of persons who were successful that issue of suspension came.

That the County Executive Secretary and County Assembly wrote letters of suspension because persons they desired to get the positions were not successful – HHW10 Letters from secretary addressed to Respondent asked that a specific person be appointed to position of Head of Treasury, Chief Finance Officer and Head of Human Resource.

It was argued that positions in the County Public Service have to be filled competitively pursuant to section 66 of the Act, but applicant wanted to hand pick and when Respondent refused that is when issue of suspending recruitment came up.

It was submitted that the user department requesting for recruitment of the relevant officers confirmed budgetary allocation for the position were available –HHW10 confirms the positions were budgeted for.

That the Respondent had respondent to the issue of ghost workers, staff establishment, structures and optimal staffing levels as having been addressed vide HHW14 letter dated 20th September 2016.

That the exparte applicant rushed to court upon receiving HHW14. It was argued that there is no basis to quash the decision of the Respondent as laid down procedures before, during and after recruitment had been followed.

That the reason for stopping/suspending recruitment was not because of illegality procedural impropriety or bad faith on the part of the Respondent and the motion should be dismissed. The issues for determination in this matter are:-

1. Whether Respondent had jurisdiction to conduct interviews and recruitment for the applicant.
2. Whether the persons affected by the persons affected by the decision made by the Respondent were heard before it was made.

3. Whether in making the decision the Respondent took into account relevant or did take into account irrelevant matters.

These are some of the elements/Grounds identified by the court of appeal authority of Municipal council of Mombasa vs Republic and Umoja consultants Ltd C.A No. 185 of 2001 when it held

“Judicial Review is concerned with the decision making process and not with the merits of the decision itself”.

What this court will look at is whether the applicant has proved that the Respondents in recruiting officers for the various departments within Isiolo County flouted procedure, acted ultra vires it's powers and /or jurisdiction;

Whether parties concerned had notice of recruitment and were given a hearing; whether relevant factors were not taken into account and whether the decision was arbitrary, illegal or unreasonable.

Annexure HHW2 are minutes of a meeting of Land Officials and County secretary on 31st March 2016 deliberating on problems at lands office and it was resolved that the County Public Service Board advertises for the position for physical planning Assistants since the heads of Department had budgeted for recruitment of 2 physical planners in 2015/2016 financial year. It was actually resolved that the County Recruits 3 physical Planning Assistants, 2 Surveyors and Director of Lands as per 2015/2016 financial year budget and the savings made from the 3 officials transferred to National Government.

On 10th May 2016, 5 days after the meeting or resolution at the County Secretary's office the County Assembly wrote to Secretary/CEO County Public Service Board in reference to recruitment into the County Public Service in reference to Report of the Ad-Hoc Committee on recruitment indicated their report had been tabled on 3.12.2015 and adopted on 10.12.2015 and resolution forwarded to the Governor but same had not been implemented. They required the CEO (PSB to implement Recommendation of the Report within 60 calendar days from 10.5.2015. From both the Applicant and Respondents bundle of documents different departments vide indent forms and letters requested for recruitment of different cadre of staff and this between the periods 8th August 2016 and 19th August 2016 from County Chief Office Public Health Services letter dated 20th September 2016 forwarding indent forms from Chief officer livestock and fisheries a letter dated 3rd October 2016 from Chief officer Environment and Natural Resources. Letter from Town Administrator requiring extension of contract for fire crews.

Indent forms for recruitment of County Director of Agriculture was forwarded to County Public Service on 8th September 2016 approved by Head of Department and County Chief Officer.

I have endeavoured to go through the documents just to establish that the applicant through the County Assembly and County secretary together with different Heads of Department within the county prompted the Respondent to undertake recruitment which advertisements for vacancies was paid for by the Department of Lands. Out of the eleven officers whom the Deputy Governor by letter dated 6th October 2016 deployed and sought Treasury to allow access to IFMIS only 3 in the Finance Department are sought to be prohibited from taking over office. Could it have been possible that the Respondent flouted the rules of procedures natural justice in the recruitment of the 3 officers whom the applicant seeks to quash their appointment and not the other 9 officers?

The applicant acknowledged the mandate of the Respondent in recruitment on behalf of the County Assembly and the County Executive on request of the 2 arms of County Government through Heads of Department and therefore the Respondent didn't go beyond their jurisdiction. The applicant is not saying that the Respondent conducted itself in a discriminatory manner in the recruitment exercise. The recruitment had been stopped in 2015 citing similar reasons which Mr Ismail A. Isaack in his letter to County Secretary dated 20th September 2016 had been called and County Assembly gave a green light for recruitment to go on. This court finds that the conduct of the county secretary and Abdi sola of the Isiolo County Assembly in requiring the suspension of recruiting after authorising it is not bonafide and raises

eyebrows.

In that regard the Exparte Applicant's application is disallowed. Exparte Applicants submissions at paragraph 24 – page6 contradicts paragraph 24 which provides that Respondent must comply with Section 63 (2) of County Government Act. There is no provision requiring Respondent to sign the indent forms and the Letters and indent forms in the bundle of documents for both the exparte applicant and Respondent are duly signed.

When the County Secretary met with Land Officers and instructed the Respondent to recruit there was an urgency and it was clearly indicated that the vacancies had been budgeted for and some savings had been made from officers who were redeployed to National Government. It is not explained when it was realised there was lack of funds and change of heart.

The County Assembly gave 60 days for implementation of recommendations of the Ad Hoc Committee on Recruitment to the County Public Service Board, which included recruitment of officers. The county Executive appeared to be divided as to whether recruitment was legal or illegal and that is why the Deputy Governor the one responsible for the Executive authenticated the recruitment. I don't find that the decision of the Respondent irrational/outrageous or unreasonable because it was originated by the Ex parte Applicant backed by Heads of Department as well as the Deputy Governor. The indecision and change of mind by then Exparte Applicant is what appears suspect and unreasonable as it contradicts their earlier decision authorising Respondent to undertake recruitment. No orders as to costs.

HON. A. ONG'INJO

JUDGE

In the presence of:-

Ms Thangicia Advocate holding brief for Mr Kariuki for Respondent.

M/s Ahmed Nassir Advocate for Applicant – N/A

Court

Judgement delivered, dated and signed in court on this 31st day of August 2017.

Certified copies to be supplied.

HON. A. ONG'INJO

JUDGE