



REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
PETITION NO. 8 OF 2017

BETWEEN

DANIEL OWINO AOL.....PETITIONER

AND

SECRETARY, KISUMU COUNTY PUBLIC SERVICE BOARD.....1<sup>ST</sup>  
RESPONDENT

COUNTY GOVERNMENT OF KISUMU.....2<sup>ND</sup>  
RESPONDENT

COUNTY ASSEMBLY OF KISUMU.....3<sup>RD</sup>  
RESPONDENT

JUDGMENT

**Introduction**

1. The petitioner is a resident of Kisumu County within the Republic of Kenya. He describes himself as an ordinary citizen who places a high premium on the principles of democratic governance and public participation.
2. The 1<sup>st</sup> respondent, the Secretary of the Kisumu County Public Service Board, is appointed the County Governor with the approval of the County Assembly pursuant to **section 44** of the *County Governments Act*. Under that Act, he has various duties and is the head of the County Public Service.
3. The 2<sup>nd</sup> respondent is the government of Kisumu County and is created under **Article 176** of the Constitution. Under **Article 235** of the Constitution, it is responsible for staffing of the county governments. Under the *Urban Areas and Cities Act*, it undertakes management of Kisumu City.
4. The 3<sup>rd</sup> respondent is the County Assembly of Kisumu created under **Article 176** of the Constitution. Under **section 13** of the *Urban Areas and Cities Act*, the 3<sup>rd</sup> respondent has the power to approve the appointment of members to the City Board.

**The petition**

5. This petition dated 15<sup>th</sup> May 2017, brought under **Articles 22, 23, 159, 165** and **258** of the Constitution, concerns the proposed recruitment of the Kisumu City Board (“the Board”). These

vacancies were advertised by the 1<sup>st</sup> respondent in newspapers with nationwide circulation as well as on the website of the county government of Kisumu.

6. The petitioner was aggrieved by the 1<sup>st</sup> respondent's move to recruit members of the Board. In his view, the **Urban Areas and Cities Act, 2011** ("the **Act**") anticipates the appointment of a city board at the beginning of the administration of a new county administration for a term of five years. He contends that the term of office granted to the members of the Board is concurrent with the term of office of the appointing governor, because **section 11** of the **Act** requires the board to enjoy a principal and agent relationship with the County Government under the executive leadership of the Governor.

7. The petitioner further contends that while the Kisumu County Government was set up in accordance with the law, the county chief executive failed, ignored or refused to appoint members of the Board contrary to the stipulations of **sections 11 (b), 12, 20 and 21** of **Act** as read together with **Article 235** of the Constitution. He therefore contends that the effect of the recruitment of the Board would be unconstitutional since the term of office of the Board would run counter to the term of the Governor and will also create unnecessary conflict and confusion.

8. The petitioner sees the intended recruitment of the members of the Board, a few months to the General Elections, as a calculated move to contravene the constitutional imperatives laid down in **Articles 1, 10(2), 38 and 81** of the Constitution. He argues that allowed to continue, the process would have interfered with the rights of the voters of Kisumu County to take part in the recruitment process. In addition, he alleges that since there was, at the time, an imminent change of administration in the county government, the recruitment would have abrogated the constitutional principle of efficient, effective and economic use of resources as enshrined in **Article 232 (1)(b)** of the Constitution.

9. For these reasons the petitioner considers that the decision of the respondents to begin recruitment was capricious and unreasonable, and taken without due regard to the national principle of sustainable development. The petitioner therefore prays for the following main orders:

*a. A declaration that the city board conceived under section 12, 13 and 15 of the Urban Areas and Cities Act has a lifespan that is equal and concurrent to the administration of the county governor, the appointing principal authority contemplated under the constitution for a term of five years;*

*b. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondent, through its purported advertisement dated March 22<sup>nd</sup> 2017 lack legitimate authority and power to direct the recruitment of a city board as are required in law and it is unable to make any hiring of the same for a term of five years;*

*c. A declaration that the planned appointment of members of the city board by either the purported directives of the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent is unconstitutional as it is inconsistent with the constitutional principles of efficient, effective and economic use of resources directed under article 232 of the Constitution of Kenya;*

*d. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondent does not have exclusive jurisdiction and/or powers to constitute the Kisumu City Board and an order nullifying the decision to recruit and appoint members to the City Board and an order to nullify the decision to recruit and appoint members to the city board barely three months to the expiry of the term of office of such a board and the county government;*

*e. An order of permanent injunction be issued in favour of the petitioner as against the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent; its members and officers barring them from recruiting or announcing membership to the Kisumu City Board; and*

*f. An order of permanent injunction against the 3<sup>rd</sup> respondent barring it from engaging in recruitment for appointment to the Kisumu City Board.*

## The Response

10. The respondent's do not dispute the facts upon which the petition is grounded. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed grounds of opposition in which they argued that the petition amounts to a violation of the doctrine of separation of powers by requiring the court to interfere with the powers, functions and discretion vested in the executive structure represented by the 2<sup>nd</sup> respondent. Further, that the court lacks jurisdiction to entertain the petition. That the 1<sup>st</sup> and 3<sup>rd</sup> respondents are not legal persons within the eyes of the law and therefore cannot be sued and that the petitioner has failed to demonstrate how the constitutional provisions relied upon have been violated. They also contend that the petitioner has failed to demonstrate that the process of the creation of the Kisumu City Board is unconstitutional, unprocedural or illegal.

11. The respondents also opposed the petition through replying affidavits sworn by Hesbon Owuor Hongo, who opposes the petition on behalf of the 1<sup>st</sup> respondent, and Dr Luis Ojwang, the acting County Secretary of the 2<sup>nd</sup> respondent. They also filed written submission which were highlighted at the hearing.

12. The gist of the respondent's averments is that the process of recruitment of the Board conforms with all the provisions of the law and that neither the 1<sup>st</sup> nor 2<sup>nd</sup> respondents have violated any constitutional or statutory provisions in the recruitment.

13. The respondents argue that the status of the 2<sup>nd</sup> respondent is that of a body corporate with perpetual succession which implies that a county government cannot grind to a halt because there is a change in the political leadership of the county. Moreover, the management of the city, through the Board is a delegated function on behalf of the County Government and that there are no constitutional or statutory timelines within which the Board ought to have been put in place. Further, they contend, it cannot be argued that there existed a lacuna in the management of the city.

14. The respondents also point out that 5 of the 11 members of the proposed Board, would be nominated by various stakeholders thus the proposed recruitment is not an exercise undertaken exclusively by the 2<sup>nd</sup> respondent.

15. The respondents submit that the petition is an abuse of the principle of separation of powers since stopping the recruitment would interfere with the 2<sup>nd</sup> respondent's prerogative to manage county affairs.

## Determination

16. The parties filed written submissions which they highlighted orally. I shall first deal with the respondents' contention that this petition does not meet the basic threshold for constitutional petitions as set out in *Anarita Karimi Njeru v Republic (No.1) [1978] KLR 154* as affirmed by the Court of Appeal in *Mumo Matemu v Trusted Society for Human Rights alliance & 5 Others NRB CA Civil Appeal 290 of 2012 [2013]eKLR*. In these authorities, the courts stated that a petitioner ought to set out his claim against the respondent with a reasonable degree of precision. However, the Court of Appeal in *Mumo Matemu v Trusted Society for Human Rights Alliance & 5 Others* did not equate precision to mean exactitude. What is important is for the petitions to point to the Articles of the Constitution violated in a manner that makes it possible for the respondents to answer the claim and enable the court adjudicate upon it. In *Peter Michobo Muiru v Barclays Bank of Kenya Ltd & Another NRB Petition 254 of 2015 [2016] eKLR* this point was elaborated as follows:

*[9] The principle, as this court has previously stated, does not however equate absolute precision. There is no need for absolute and artificial specificity: .... The general approach should be that each case must be independently viewed and understood by the court and where the court as well as the Respondent can painlessly identify and understand the petitioner's case as well as the constitutional trajectory the case takes, then the merits of the case ought to be ventured into. Stalling the case through the technicality of want of formal competence will take a back seat.*

17. While the petition that is presently before the court is not drafted in the most elegant manner, it is clear it alleges that the respondents' actions threaten to violate various constitutional provisions, and more specifically those with regard to the sovereignty of the Kenyan people, the supremacy of the Constitution, the exercise of political rights and the principles of public service. By dint of **Article 22 (1)** of the Constitution, any person has the right to seek remedy for the actual or threatened violation of the rights contained in Chapter Four of the Constitution. This petition is therefore properly before the court.

18. The respondent urged this court not to entertain the petition as to do so, and consequently to make any orders would violate the principle of separation of powers. In **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others Civil Appeal Nos. 17 & 18 of 2015 (Consolidated) [2015] eKLR**, the Court of Appeal stated that the essence of the doctrine separation of powers:

*... is that the Executive, the Legislature and the Judiciary constitute three separate and independent arms of government with different and exclusive responsibilities. The legislative function, that is the enactment of laws, belongs to the legislature; the implementation of law and government policies is the role of the Executive; and the interpretation and enforcement of the rule of law is the mandate of the Judiciary. By virtue of this separation, it is not permissible for any branch to interfere with the others' spheres.*

19. **Section 13** of the **Act** requires that a city board be appointed, through a competitive process, by the county executive committee, with the approval of a county assembly. By virtue of **Article 179** of the Constitution, the county executive committee exercises the executive function of the county government. In accordance with the principle of separation of powers, courts of law do not interfere with the manner in which other organs of government perform their functions. The only way in which a court may interfere with the actions of another arm of government is it acts outside the prescription of the law. This principle was aptly captured by the South Africa Constitutional Court in **Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11 at para. 200** where it is stated that:

*[W]hile the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution.*

20. The petitioner's main grievance is that the respondents are violating the law by attempting to recruit the members of the Board four months before the general election for several reasons. The petitioner submits that the respondents acted unreasonably by failing to establish the Board for the last four years even without constitutional and statutory timelines. The respondents on their part maintain that this is an erroneous position as the Board is an entity whose life is independent from the office of the Governor.

21. A summary of the statutory scheme providing for the establishment of the Board is as follows. **Section 12** of the **Act** provides that the management of a city and municipality is vested in the county government and administered on its behalf by various organs, among them a board constituted under **sections 13** and **14** of the **Act**. Under **section 12(2)** of the **Act**, such a board is a body corporate with perpetual succession with all the powers attendant to such bodies. The recruitment process for these bodies is set out under **section 13** of the **Act**. 6 of the members of the board are to be appointed by the county executive, with the approval of the 3<sup>rd</sup> respondent. Of the 6 members, at least 5 are to be nominated by various stakeholders and thereafter appointed by the county executive committee and approved by the county assembly.

22. Removal of the members of the board is contemplated under **sections 16** and **18**. **Section 16** details the reasons why a member of the board will cease to hold office while **section 18** details the reasons why a member of the board may be removed from office. Nothing in these sections suggests that the term of a member of the board is contemporaneous with that of a governor. While the respondents have not explained why the city board has been so long in coming, it is clear that there are no timelines within which the respondents are required to set up the city board as contemplated by the **Act**.

23. The petitioner's grounds for invoking **Article 22** of the Constitution is that his rights and those of the citizens of Kisumu County under **Article 38** of the Constitution are threatened. In his view, the

recruitment would infringe his political rights and the political rights of other voters in Kisumu County as the new members of the board would have been appointed contrary to the framework provided under **Article 184 (1)(b)** of the Constitution. This Article provides for national legislation that forms the basis for governance and management of urban areas and cities.

24. It is unclear how the proposed recruitment would violate political rights contained in **Article 38** of the Constitution. For purposes of clarity, **Article 38** of the Constitution states as follows:

*38. (1) Every citizen is free to make political choices, which includes the right—*

*(a) to form, or participate in forming, a political party;*

*(b) to participate in the activities of, or recruit members for, a political party; or*

*(c) to campaign for a political party or cause.*

*(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—*

*(a) any elective public body or office established under this Constitution; or*

*(b) any office of any political party of which the citizen is a member.*

*(3) Every adult citizen has the right, without unreasonable restrictions—*

*(a) to be registered as a voter;*

*(b) to vote by secret ballot in any election or referendum; and*

*(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.*

25. When the petitioner's case is juxtaposed on the provisions of **Article 38**, I have set out above, it is difficult to see how recruitment of the members of the Board would prevent the petitioner or other resident of the County from making his political choices or violate his right to a free and fair election. In any case, the legislature has wide discretion in providing a statutory scheme for governance and management of cities and towns under **Article 184 (1)(b)** of the Constitution and this has been done under the **Act**. This claim has no basis clearly has no basis.

26. The 3<sup>rd</sup> respondent submitted that the order of a permanent mandatory injunction ought not be granted as the petitioner has not laid a basis for the same. The order sought, as prayed for by the petitioner would effectively restrain the respondent from ever undertaking a recruitment of members of the Board. As this is a statutory duty, barring any illegality, a court cannot issue orders permanently restraining the respondents from fulfilling its statutory mandate.

27. By allowing prayer (a) of the petition, the court would in effect '*personalise*' the Board by tying it to the tenure of the Governor which would be inconsistent with good governance and amount to re-writing the **Act**. The **Act** is clear on circumstances when one ceases to be a member of the Board and the expiration of term of office of the Governor is not one of them.

28. It must now be clear that that the petition lacks merit and it must accordingly fail. It is dismissed with no order as to costs. The interim orders in force are discharged forthwith.

**DATED and DELIVERED at KISUMU this 18<sup>th</sup> day of September 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Aluoka instructed by Nyarango and Company Advocates for the petitioner.

Mr Amondi instructed by Amondi and Company Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondent.

Mr Rodi instructed by Rodi Orege and Company Advocates for the 3<sup>rd</sup> respondent.