



**REPUBLIC OF KENYA**

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

**PETITION NO. 1 OF 2016**

**OMAR HASSAN ELMI ..... PETITIONER**

**V E R S U S**

**1. COUNTY GOVERNMENT OF WAJIR AND**

**2. WAJIR PUBLIC SERVICE BOARD ..... RESPONDENT**

**RULING**

**BACKGROUND**

1. On the 24th of March 2016 the petitioner filed a constitutional petition in the High Court at Nairobi against two respondents who are the County Government of Wajir and the Wajir Public Service Board. In the petition, he sought a declaration that the two respondents had contravened the petitioner's rights under Article 10, 20, 21, 22, 27, 35, 47, 56 and 232 of the Constitution. He also sought an order that the recruitment of 18 Town Administrators be quashed. Thirdly, he sought an order that the County Secretary Wajir County Government be surcharged for the monies illegally earned by the 18 Town Administrators. Further he sought an order of prohibition stopping the recruitment of the 18 Town Administrators. He lastly, sought for costs of the petition and any other orders this honourable will deem fit to grant.

2. On the same day, he the petitioner filed a Notice of Motion application under Certificate of Urgency, under Article 23 and 165 of the Constitution of Kenya 2010 seeking conservatory orders by way of injunction restraining the respondents whether by themselves or their agents, servants and or employees from proceeding or making any appointments for the position of Town Administrators Wajir County until the interparties hearing and final determination of the application and or until further orders of this court. He also sought for grant of conservatory orders by way of injunction restraining the respondent whether by themselves or their agents, servants and or their employees from proceeding and or making any appointments for the position of Town Administrators until the final determination of the petition herein. He further sought that costs of the application be provided for.

3. When the matter came up before the Judge in Nairobi (Onguto –J) the court certified the application (Notice of Motion) urgent and directed that the file be transmitted to the Garissa High Court for further progress, and fixed a mention at Garissa for 7<sup>th</sup> April 2016.

4. The matter was then placed before me at Garissa on 7th April 2016, when Mr. Nyasani held brief for Mr. Anyoka for the petitioner, and asked that the court grants interim conservatory orders pending the interparties hearing of the application. No counsel appeared for the respondents though the mention date of 7<sup>th</sup> April 2016 was taken in the presence of counsel for both sides. The court declined to grant the

interim conservatory orders, and ordered that the application be heard interparties and fixed it for 25<sup>th</sup> April 2016.

### **PRELIMINARY OBJECTION**

5. On the 25<sup>th</sup> of April 2016 Mr. Nyasani again held brief for Mr. Anyoka while Mr. Issa and M/s Mugo appeared for the respondents. It was then brought to the attention of the court that on the same date, the respondents' counsel had filed a Preliminary Objection in the following terms:-

1. *That the court does not have jurisdiction to hear the petition or the Notice of Motion application as section 77 of the County Governments Act requires that an appeal be preferred to the Public Service Commission before filing proceedings before this honourable Court.*
2. *That on the Court of Appeal authority Speaker of the National Assembly versus Karume (1990 – 1994) EA 549 the petitioner should have invoked the statutory grievance procedure under the statute.*
3. *That the proceedings herein are premature and defective as the 2nd respondent is still in the process of appointing Town Administrators in exercise of his mandate under Section 63 of the County Governments Act, and the claim by the petitioner is therefore not justiciable.*
4. *That the petitioner's Notice of Motion application dated 23rd March 2016 is therefore premature, defective and an abuse of the court process and should be struck out with costs.*

### **SUBMISSION OF THE PARTIES.**

6. With this new development, the advocates for the parties present in court, agreed that the Preliminary Objection be determined first and proceeds by way of filing written submissions and a ruling date be fixed by the court. Counsel on both sides agreed by consent that ruling on the Preliminary Objection be delivered by the court on 25<sup>th</sup> May 2016, by which time, parties counsel were to have filed and served their written submissions.

7. I observe that the respondent's counsel M/s. Issa and Company filed their written submissions on 4<sup>th</sup> May 2016. The petitioner's counsel Anyoka & Company Advocates filed their written submissions on 24<sup>th</sup> May 2016, a day before the date for delivery of the ruling. Counsel for the respondents relied on several court cases in their written submissions to the preliminary objection. Counsel for the petitioner relied on one case authority.

### **ANALYSIS AND FINDINGS.**

8. I have perused the petition and application and all documents filed and the submissions filed by counsel on both sides.

9. What is for decision today is the preliminary objection which was filed by counsel for the respondents.

10. A preliminary objection is an objection raised on a point or points of law which when allowed can determine the whole case. Its determination can thus have the effect of saving precious courts time and costs to the parties.

11. What constitutes a valid preliminary objection was considered by the defunct Court of Appeal for East Africa in the case of *Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors Ltd (1969) EA 696*. In that case Law JA stated as follows at page 700

*“so far as I am aware 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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.*

12. It is clear from the above holding of the learned Judge of Appeal, that a preliminary objection has to relate to a pure point of law which may determine the suit or proceedings at that preliminary stage.

13. In the same case of *Mukisa Biscuits (supra) Sir Charles Newbold P* stated thus in regard to a preliminary objection –

***“ the first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurre. It raises a pure point of law which is argued on the assumption that the facts pleaded by the other side are correct. It cannot be raised if any fact has 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 un necessary increase costs and, on occasion, confuse issues”.***

14. It follows that points of law can be raised as preliminary objections, only if the facts between the parties have been agreed or are not in dispute. Preliminary objections should not be raised when the facts are in dispute. They should also not be raised when what is required is the exercise of discretion by the court.

15. The preliminary objection herein is that this court has no jurisdiction to adjudicate on this matter, since provision has been made by Parliament under section 77 and 63 of the County Governments Act, for resolving the issues herein.

16. Indeed, when a court determines that it has no jurisdiction to entertain a matter it has to down its tool at that point. It cannot proceed any further to entertain or hear the matter when it has no jurisdiction. See the case of

*Lilian “S” -vs- Caltex Oil (K)ltd (1986 – 1989) 1EA 305*, wherein at page 314 the court of Appeal stated as follows:-

***“Jurisdiction is everything. Without it, a court has no power to take one step, where a court has no jurisdiction there would be no basis of a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter, the moment it holds the opinion that it is without jurisdiction”.***

17. Section 77 of the County Governments Act 2012, relied upon by the respondents counsel to support the preliminary objections provides as follows:-

***77 Appeals to the Public Service Commission.***

1. ***Any person dissatisfied or affected by a decision made by the County Service Board or a person in exercise or purported exercise of disciplinary control against any County public officer may appeal to the Public Service Commission (in this part referred to as the “Commission”) against the decision.***
2. ***The Commission shall entertain appeals on any decision relating to employment of a person in a County Government including a decision in respect of :-***
  - a. ***Recruitment, selection, appointment and qualifications attached to any office.***
  - b. ***Remuneration and terms and conditions of service.***
  - c. ***Disciplinary control.***
  - d. ***National values and principles of governance, under Article 10, and values and principles of Public Service under Article 232 of the Constitution.***
  - e. ***Retirement and other removal from service.***
  - f. ***Pension benefits, gratuity and any other terminal benefits, or***
  - g. ***Any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.***

3. **An appeal under subsection (I) shall be in writing and made, within ninety days after the date of the decision, but the commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.**
4. **The Commission shall not entertain an appeal more than once in respect of the same decision.**
5. **Any person dissatisfied or affected by a decision made by the Commission in appeal in a decision made in a disciplinary cause may apply for review and the Commission may admit the application if:-**
  - a. **The Commission is satisfied that there appear in the application new and material facts which might have affected its earlier decision, and if adequate reasons for the non disclosure of such facts at an earlier date are given; or**
  - b. **There is an error apparent on the record of either decision**
6. **An application for review under subsection (5) shall be in writing and made within the time prescribed by the Commission in regulations governing disciplinary proceedings, but the commission may entertain an application for review later if, in the opinion of the commission, the circumstances warrant it.**

18. The respondent's counsel has relied on several cases but principally the case of **Speaker of the National Assembly –vs- Karume (1990 – 1994) EA 549** and the case of **International Centre of Policy conflict and Others –vs- Attorney General and others (2013) 2EA 30** to support the respondents contention that this court has no jurisdiction to entertain these proceedings.

19. The petitioner's counsel on the other hand has relied on the case of **Andrew Shiroko Shilenje –vs- County Government of Kakamega and the Kakamega County Public Service Board** to support the petitioner's position that this court has jurisdiction to entertain the proceedings herein.

20. The petitioner herein has claimed that the respondents advertised various positions including six posts for Town Administrators for Griftu, Eldas, Bute, Tarbaj, Wajir County and Habasweni and he applied for the position of Town Administrator of Bute Town Wajir County. The petitioner has also stated that he later learnt that 18 people had been appointed by the first respondents as Town Administrators on Job Group P on temporary appointments terminable at the expiry of 3 months starting from 6th January 2015. The petitioner has also stated that he recently realised that the County Secretary Wajir Town had already finalised appointments of persons to the position of Town Administrators. He complains that the said actions contravened Article 10 of the Constitution, as the process was not transparent, lacked integrity, was not accountable and was in total disregard of principle of good governance in that no shortlisting was done, no interviews were conducted and the petitioner was never notified of the status or fate of his application.

21. It is apparent from the facts disclosed by the petitioner, which have not been disputed by the respondents, that the petitioner applied for a job of Town Administrator Bute Town Wajir and he learnt later that other people were appointed, but he was neither called for an interview nor notified of the fate of his application. He has thus come to this court through a Constitutional Petition.

22. In my view, this court has jurisdiction to ensure that every Kenyan is accorded treatment consonant with what is expected under the provisions of the Constitution of Kenya 2010. Where violations of the Constitution are established, this court has the jurisdiction and powers, and duty to intervene, under Article 23 and 165 of the Constitution.

23. In the case of **International Centre for Policy and conflict and others –vs- Attorney General and others (supra)** relied upon by advocate for the respondents, a five Judge bench of the High Court held that in constitutional matters, the High Court does not have original jurisdiction only where the court is expressly excluded, such as in the case of the qualifications and election to the office of the President.

24. In the case of **Andrew Shiroko Shilenge –vs- County Government of Kakamega and the Kakamega County Public Service Board – Kakamega Constitutional Petition No. 22 of 2014**, relied upon by

counsel for the petitioner, the learned Judge held as follows:-

***“Under Article 165(3)(b) and (d), the High Court is called upon to deal with issues whether right or fundamental freedoms in the Bill of Rights are denied or violated, infringed or threatened and to also deal with the question of interpretation of the constitution.***

***The jurisdiction is further provided for under Article 23 of the Constitution. The Bill of Rights and fundamental freedoms are provided under Article 26 and 57 inclusive of the Constitution. The petition in issue has been brought claiming alleged contravention of the Petitioner’s rights under Articles 23, 27, 35 and 47 of the Constitution. This clearly means that the rights alleged faced with contravention are those over which the Constitution places their protection on the High Court. This court therefore has the jurisdiction to determine all the issues raised in the petition. The objection is therefore overruled”.***

25. In my view, the case of ***Speaker of the National Assembly –vs- Karume (1990-1994) EA 549*** ***relied by counsel for the respondents***, having been decided during a different and previous Constitutional dispensation, is not applicable in the present circumstances.

26. From the facts and reliefs sought by the petitioner herein, I find that this court has jurisdiction to entertain and hear and determine these Constitutional proceedings, the merits of which will be determined after hearing the parties. I find that the petition is not premature as every public officer or organ is accountable and bound to act in accordance with the Constitution, the respondents herein included – The petition herein is also properly before this court, as the jurisdiction of the High Court has not been ousted by the law or the Constitution.

#### **DETERMINATION**

27. Consequently, I dismiss the preliminary objection and hold that this court has jurisdiction to hear and determine this matter. Costs of the preliminary objection will follow the determination of the petition.

**Dated and delivered at Garissa this 25th May 2016.**

**GEORGE DULU**

**JUDGE**