



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CONSTITUTIONAL PETITION NO. 2 OF 2016

IN THE MATTER OF ARTICLE 10, 22, 23, 27, 165, 176, 185, 232, 235 & 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 56, 57, 58, 59, 62, 65 OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012

AND

IN THE MATTER OF THE COUNTY PUBLIC SERVICE BOARD, KITUI COUNTY

AND IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE CONSTITUTION OF KENYA, 2010 AND THE COUNTY GOVERNMENT ACT, 2012

BETWEEN

WILSON MUTEGI NYAGA.....1ST PETITIONER

CHARLES K. KIVAVI.....2ND PETITIONER

FRANCIS K. KULA.....3RD PETITIONER

VERSUS

THE COUNTY PUBLIC SERVICE BOARD, KITUI COUNTY.....1ST RESPONDENT

THE COUNTY SECRETARY, COUNTY GOVT OF KITUI.....2ND RESPONDENT

THE GOVERNOR, KITUI COUNTY.....3RD RESPONDENT

RULING

1. On the **17th June, 2016**, the Petitioners herein filed a Petition against the Respondents in their capacity as citizens who reside within **Kitui County**. The 1st Respondent was sued in its capacity as a Body Corporate and State Organ; the 2nd Respondent as the Head of Civil Service in the County and the 3rd Respondent as the Chief Executive of the County.

2. In the Petition they are seeking a declaration that: all appointment in respect of Chief Officer, Deputy

Directors of Trade, Industry, I.C.T. and Co-operatives as well as Deputy Chief Finance Officer be declared null and void; any recruitment undertaken during the time when the office of the Secretary of the 1st Respondent was vacant is null and void and the same be revoked; the establishment of two (2) offices of Deputy Secretaries without adherence of **Section 62(2)** of the **County Government Act, No. 17 of 2012** is null and void and be revoked. An order of prohibition to issue directed at the Respondents from conducting any recruitments and/or making any appointments until they are properly constituted under **Section 58(1)** of the **County Government Act, 2012**; and a permanent injunction to issue restraining the Respondent from making any appointments, engaging in any further recruitment until they comply with the provisions of **Section 59(1)(d)(e)** and **(f)** of the **County Government Act, 2012** on preparation of reports for submissions to the County Assembly on the execution of functions and compliance with **Article 10** and **232** of the **Constitution**.

3. It is stated that the Respondents have failed to provide periodical reports to the Assembly; they have not embraced regional balance in recruitment of employees; persons with disability in their employment stand at 0.01%; recruitment exercise has been conducted without a Secretary to the Board; the **Chief Officers** were appointed without approval of the **County Assembly** and there was no competition in short listing of two (2) Candidates for the position of **Deputy County Secretaries**.

4. Also filed on 17th June, 2016 is a Notice of Motion seeking conservatory orders to issue prohibiting the Respondents from conducting recruitments and/or making any appointments unless they are properly constituted under **Section 58(1)** of the **County Government Act, 2012** and complied with the provisions of **Section 59(1)(d)(e)** and **(f)** of the **County Government Act, 2012**.

5. In a response thereto the Respondents through the Chairperson of the 1st Respondent stated that the 1st Respondent is properly constituted and continues to discharge its functions under **Section 59** of the **County Government Act, 2012 (Act)**. Following the resignation of the Secretary to the **County Public Service Board**, a qualified person was appointed by the appointing authority per the requirement of **Section 64** of the **Act** in Acting Capacity. Therefore recruitments done were valid and proper. The 1st Respondent has advertised, shortlisted and interviewed candidates for the substantive position of the **Board Secretary**. Advertisements were placed in print and electronic media nationwide. Queries raised by the Auditor General were substantively addressed. They complied with the principle of employing people living with disabilities and submission of reports to the **County Assembly** as required by Law has been regular.

6. It was upon this background that the Respondents filed a Notice of Preliminary Objection on points of law seeking to apply to strike out the entire application and petition. The basis of the Preliminary Objection was that the Notice of Motion and Petition were premature and contravened the mandatory provisions of **Section 75** and **77** of the **County Government Act, 2012**; This court lacks jurisdiction to hear and determine the matter in view of the mandatory provisions of **Section 12** of the **Employment and Labour Relations Court Act**; the Notice of Motion and Petition violate the principles espoused in the case of **Anarita Karimi Njeru vs. Republic (No. 1) (1979) I KLR 154** and **Mumo Matemu vs. Trusted Society of Human Rights Alliance Civil Appeal No. 290 of 2012 (2013) eKLR** as they lack precision and specificity and that they are incompetent and bad in law as they do not raise any constitutional issues for determination requiring the court's intervention.

7. The application was canvassed by way of oral submissions. It was submitted by Counsel for the Respondents, **Mr. Nyaburi** that the Petition is premature. Petitioners were challenging recruitment conducted by the 1st Respondent for not being properly constituted, thus should have been brought to the attention of the **County Board** or appeal to the **Public Service Commission** but not this court as they could not bypass legislation by way of Constitutional Petition. Secondly, he stated that the Petition touches on employment of over **300 employees** of the **County Authority** which falls under the ambit of **Employment and Labour Relations Court**. Arguing that the Petition violates the principles espoused in the **Anarita Karimi Njeru vs. Attorney General (1979) KLR 154** case and **Mumo Matemu vs. Trusted Society of Human Rights Alliance and Others**, he stated that it simply states facts but not indicated how the Constitution has been violated? That there is no indication how the Articles cited were

violated.

8. In response thereto, Counsel for the Petitioners, **Mr. Nyamu** opposing the Preliminary Objection raised submitted that the argument that the Petition is premature is a misconception. It was his contention that the Respondents acted in contravention of the Constitution; the actual violation has been cited which cannot be dealt with under **Section 77 of the County Government Act, 2012** and the provision that appeals be heard by the **Public Service Commission** is not mandatory as it can only entertain it. There is the violation of failure to subject themselves to the **Oversight Authority (County Assembly)** which does not fall under the Public Service Board. The **County Board** and **County Governor** being a State Organ and State Officer respectively who are subject to supervisory powers of the High Court. No relationship envisaged by parties who are subject to the **Employment and Labour Relations Act** exists between the Petitioner and Respondents.

9. At the outset, a jurisdictional question has been raised. To determine whether or not this court lacks jurisdiction as the matter should have been raised before the **Public Service Commission** in form of an appeal, or if the Petition should have been filed before the **Employment and Labour Relations Court**, I must remind myself of the importance of dealing with the matter if clothed with jurisdiction. This fact was well put in the case of **Owners of the Motor-Vessel Lillians vs. Caltex Oil (Kenya) Limited 1989 KLR 1** where **Nyarangi J. A.** stated:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

10. The law that divest this court of jurisdiction of matters raised in the Petition per the argument of Learned Counsel for the Respondents, **Mr. Nyaburi** is found in **Section 77 of the County Government Act** that provides thus:

“(1) Any person dissatisfied or affected by a decision made by the County Public 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 (1) 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 to the same decision.

(5) Any person dissatisfied or affected by a decision made by the Commission on appeal in a decision made in a disciplinary case 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 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.”

Looking at the facts that give rise to this Petition, it is averred that the 1st Respondent contravened the recruitment process of officers and generally employees. Learned Counsel for the Petitioners, **Mr. Nyamu** appreciating the fact that the appellate process from decisions of the **County Public Service Board** is provided for under the **County Government Act, 2012** argues that the provision for preferring the appeal is not coached in mandatory terms.

11. The legislation has provided a procedure to be followed in case a person is offended by an action of the **County Service Board**. As stipulated it does not refer to only those affected directly but to “Any person”. In the case of **Speaker of the National Assembly vs. Karume Civil Application NAI 192 OF 1992** the Court of Appeal held:

“There was considerable merit in the submission that where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or Act of Parliament, that procedure should have been strictly followed.”

12. Looking at the cited case of **James Tinai Murete vs. County Government of Kajiado & 22 Others, Petition No. 283 of 2014** the procedure to be adopted by a party who is aggrieved was considered by the court. The Petitioners were challenging appointments made by the Respondents just like in the instant case. The constitutionality of the appointments made was questioned which hinged on a constitutional requirement. **Mumbi Ngugi, J.** considered the Preliminary Objection raised. Being of the view that the legislature did place appeals and disputes in respect of appointments with the **Public Service Commission** she dismissed the Petition.

In the instant case the gist of the matter was that the **County Public Service Board** while constituted as provided by **Section 58(1) and 64** of the **County Government Act** recruited officers and generally persons, a matter that was queried by the **Auditor General**, and a matter that is still pending before the **County Assembly**. The job sharing formular has been questioned as the Petitioners believe it is not equitable since some regions are marginalized. The issue of employment of persons with disabilities is questioned. In essence the Petitioners are arguing that the Respondents failed to uphold National Values and Principles of Governance and those set out in Public Service. **Section 77(2)(d)** is very clear, an appeal against a decision in that regard falls within the powers of the **Public Service Commission**.

From the foregoing, it is apparent that the Petitioners were required to follow the legal process laid down. Therefore approaching this court was premature.

This brings in the question whether the core constitutional jurisdiction to address rights allegedly violated herein resides with this court which should initiate a Judicial Review process amongst other remedies or if it resides with the **Employment and Labour Relations Court (E.L.R.C.)**

The High Court derives the jurisdiction to deal with constitutional issues and generally Civil/Criminal matters from **Article 165** of the **Constitution** save what falls within the jurisdiction of courts contemplated in **Article 162(2)**. **Article 162(2)(a)** provides:

“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and”

Looking at the preamble to the **Employment and Labour Relations Court Act**, it is an Act of Parliament that establishes the **Employment and Labour Relations Court** to deal with disputes relating to **Employment and Labour Relations** and connected purposes. The jurisdiction of the court is provided by **Section 12** of the **Act** which stipulate:

“(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

(c) disputes between an employers’ organisation and a trade union’s organisation;

(d) disputes between trade unions;

(e) disputes between employer organisations;

(f) disputes between an employers’ organisation and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer’s organisation or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j) disputes relating to the registration and enforcement of collective agreements.

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer’s organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

(i) interim preservation orders including injunctions in cases of urgency;

(ii) a prohibitory order;

(iii) an order for specific performance;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

(viii) any other appropriate relief as the Court may deem fit to grant.

(4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.

(5) The Court shall have jurisdiction to hear and determine appeals arising from—

(a) decisions of the Registrar of Trade Unions; and

(b) decisions of any other local tribunal or commission as may be prescribed under any written law.”

17. The dispute herein is brought by people who are aggrieved by the decision of the Respondents but are not employees of the Respondents. Similarly, there is no labour relationship between them. The statutory provision gives any person who is aggrieved the right to file an appeal before the **Public Service Commission**. Such a right does not make them employees. Therefore this case would not fall within the jurisdiction of the **Employment and Labour Relations Court**.

18. Finally, it has been argued that the Notice of Motion and the Petition dated **16th June, 2010** violate the principles espoused in the **Anarita Karimi Njeru vs. Republic (No. 1) (1979) ICLR 154** and **Mumo Matemu vs. Trusted Society of Human Rights Alliance Civil Appeal No. 290 of 2012 (2013)** as they lack precision and specificity. It was submitted that the Petition simply sets out the legal provisions of the Constitution and facts but does not indicate how the Constitution has been violated.

19. In a Constitutional Petition where there is an allegation of violation of constitutional rights, the Petitioner is obligated to set out with reasonable degree of precision the provisions of the Constitution that have been violated and the manner in which they have been contravened. This was the principle set in the case of **Anarita Karimi** which was reaffirmed by the Court of Appeal in the **Mumo Matemu** case.

20. Looking at the title of the Petition, The Articles of the Constitution alleged to have been infringed have been cited. The Petitioners' description has been given. Facts giving rise to the Petition are indicated. The Constitutional and Statutory provisions of the Law have been stated. Grounds forming the basis of the infringement of rights is given though very basic. This would be subject to proof. It would therefore be premature to dismiss the Petition on that ground.

21. Taking all these into consideration, I find the Respondents having demonstrated that the Notice of Motion and Petition are premature since the Petitioners were obligated to follow the laid down legal processes by presenting their grievance before the **Public Service Commission**.

22. In the premises the Preliminary Objection succeeds. The Petition and Notice of Motion there under is struck out with no orders as to costs.

It is so ordered.

Dated, Signed and Delivered at Kitui this 28th day of July, 2016.

L. N. MUTENDE