



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**PETITION NO. 7 OF 2014**

**JUSTUS KIMELI ROTICH.....PETITIONER**

**VERSUS**

**THE GOVERNOR COUNTY GOVERNMENT OF NANDI.....1<sup>ST</sup> RESPONDENT**

**NANDI COUNTY PUBLIC SERVICE BOARD.....2<sup>ND</sup> RESPONDENT**

**AND**

**SILAS KIPRUTO.....INTERESTED PARTY**

**JUDGEMENT**

**Background**

1. On 20<sup>th</sup> August, 2013, the County Government of Nandi, the 1<sup>st</sup> respondent herein through its Public Service Board (the 2<sup>nd</sup> respondent) advertised in the Daily Nation Newspaper vacancies for eleven posts of County Chief officers including the post of the County Chief Officer Finance and Economic Planning.

2. Several candidates who included the interested party *Mr. Silas Kipruto* were shortlisted and interviewed for the post of Chief Officer Finance and Economic Planning. According to the Petitioner, the 2<sup>nd</sup> respondent nominated persons to fill the positions of the other advertised posts but failed to nominate any of the interviewed candidates to fill the post of Chief Officer Finance and Economic Planning. Instead, the 2<sup>nd</sup> respondent placed a second advertisement in the Daily Nation of 20<sup>th</sup> March, 2014 inviting interested candidates to apply for various posts within the County Government establishment including the post of Chief Officer Finance, Economic Planning and Marketing. Unlike in the first advertisement, the second advertisement required that the candidate for the post should be a specialist in Economic Planning. It is this second advertisement that prompted the petitioner to file the instant petition.

**The Petitioner's case**

3. The Petitioner *Justus Kimeli Rotich* filed the petition on 25<sup>th</sup> March, 2014 contemporaneously with a Notice of Motion of even date. In the Notice of Motion, the Petitioner sought orders of injunction restraining the respondents from proceeding with the recruitment process for the post of the County Chief officer for finance, planning and marketing as advertised on 20<sup>th</sup> March 2014 pending the hearing and determination of the petition. This prayer was granted on 20<sup>th</sup> January, 2015 by consent of the parties. Again on 26<sup>th</sup> May, 2015, by consent of the parties, the petitioner was granted leave to amend his

petition.

4. In the Amended Petition filed on 10<sup>th</sup> June, 2015, the petitioner prayed for the following reliefs:-

**(i) Declaratory order holding that the respondents decision to abandon the recruitment process that commenced with the advertisement made on the 20<sup>th</sup> day of August 2013 was unconstitutional and in breach of the provisions of the County Government Act.**

**(ii) Declaratory order holding that the fresh recruitment process commenced by the advertisement dated 20<sup>th</sup> March, 2014 for the position of the County Finance and Planning Officer is unconstitutional and in breach of the provisions of the County Government Act.**

**(iii) Order of mandamus compelling the respondents to cancel the recruitment process for the position of the Finance Officer commenced by the advertisement made advertised on 20<sup>th</sup> March, 2014.**

**(iv) Order of Mandamus compelling the respondents to complete the recruitment process commenced by the advertisement dated 20<sup>th</sup> August, 2013 by appointing the most suitable candidate from the list of applicant shortlisted in the notice dated 21<sup>st</sup> October 2013.**

**(v) Damages**

**(vi) Costs**

**(vii) Any other relief that the honorable court may deem just to grant.**

5. The Petition is supported by a verifying affidavit sworn by the petitioner on 29<sup>th</sup> May, 2015 in which he deposed that the 2<sup>nd</sup> respondent's action of advertising for the same position twice without giving any reason for so doing after subjecting shortlisted candidates through the rigours of an interview was unlawful and unconstitutional; that the decision to abandon the recruitment process which started with the advertisement of 20<sup>th</sup> March, 2014 when it was at an advanced stage was mischievous and smirked of discrimination and favouritism; that the decision was aimed at accommodating an individual who had failed to apply for the position when it was initially advertised; that the best candidates in the interviews conducted on 30<sup>th</sup> and 31<sup>st</sup> October, 2013 were being discriminated against on the basis of gender, minority, place of origin and other unfair considerations.

6. The petitioner asserted that the decision by the 2<sup>nd</sup> respondent breached provisions of the *Constitution* and the *County Government Act*. The particulars of breach of the *Constitution* were stated in paragraph 10 of the petition as; Failure to engage fair competition and merit in appointments; lack of transparency; discrimination against shortlisted candidates; failure to observe national values and the right to human dignity, equity, human rights and non-discrimination; failure to act in an efficient and effective manner and failure to observe the principle of accountable administrative action.

7. The particulars of breach of the *County Government Act* were set out in paragraph 11 as follows;-

Failure to fill vacant positions competitively in accordance with the prescribed procedure; conferring undue advantage to an undisclosed individual; and failing to inform the public the reason for advertising for the same post twice.

### **The Respondent's case**

8. The respondent opposed the petition through a replying affidavit sworn by *Mr. Samuel K. Too*, the chairman of the 2<sup>nd</sup> respondent. In the affidavit, the 2<sup>nd</sup> respondent admitted having advertised for the post of County Chief Officer Finance and Economic Planning among other posts on 20<sup>th</sup> August, 2013

and that applicants for the post were short listed and interviewed on 31<sup>st</sup> October, 2015.

9. It is the respondent's case that after reviewing all positions of the County Chief Officers, the Board after taking into account the needs of the County Government decided that there was need to have the position filled by a specialist in planning; that the candidates who were interviewed for the post had skills in accounting but not planning; that the candidates who were interviewed did not meet the needs of the county with respect to the advertised post and they were therefore not qualified for the job.

10. The 2<sup>nd</sup> respondent denied the petitioner's claim that it had advertised for the same post twice maintaining that the second advertisement was for the post of Chief Officer Finance, Economic Planning and Marketing and its key qualification was specialization in planning; that the advertisement for the post of finance, Economic planning and Marketing was not therefore a re-advertisement of the initial post since the second advertisement was for a different position though the duties and responsibilities for both posts remained the same.

11. The 2<sup>nd</sup> respondent also denied having breached any of the provisions of the *Constitution* or the *County Government Act* in the recruitment process and asserted that expansion of the post of Chief Officer, Finance and Economic Planning to include the component of marketing was made in good faith in the best interest of the County. It maintained that the recruitment process was open and transparent and that anybody who qualified for the re-advertised post was free to apply including those that had responded to the initial advertisement.

12. On his part, the interested party supported the petition. He deposed that he applied for the post of Chief Officer for Finance and Economic Planning as advertised by the 2<sup>nd</sup> Respondent on 20<sup>th</sup> August, 2013; that he was among the candidates who were shortlisted and interviewed for the post on 31<sup>st</sup> October, 2013; that he was aware from undisclosed sources that three of the interviewed candidates were nominated for appointment but instead of submitting their names to the County Assembly for validation, the 2<sup>nd</sup> respondent advertised for the same position purporting it to be a different position by adding a marketing component.

13. He disputed the 2<sup>nd</sup> respondent's claim that the candidates who were interviewed for the earlier position were not qualified for the job contending that those candidates had the qualifications necessary to perform the tasks associated with the job.

14. The interested party alleged that as a result of the 2<sup>nd</sup> respondent's conduct, his right to a fair recruitment process had been breached. He supported the position taken by the petitioner that the advertisement for the post of chief officer economic planning and marketing was unlawful as it breached undisclosed provisions of the *Constitution* and the *County Government Act*.

15. By consent of the parties, the petition was prosecuted by way of affidavits and written submissions. The submissions by the petitioner were filed on 30<sup>th</sup> December, 2014 while those of the respondents were filed on 10<sup>th</sup> July, 2015. The interested party was the last one to file his submissions on 3<sup>rd</sup> November, 2015. The written submissions were highlighted before me on 10<sup>th</sup> May, 2016. Learned counsel *Mr. Momanyi* appeared for the petitioner while learned counsel *Mr. Kamau* represented the respondents. Learned counsel *Mr. Magut* urged the interested party's case.

16. After carefully considering the petition and all the submissions made by the parties, I find that even though the respondents did not challenge the competence of the petition as filed, I find that this is an issue that arises from a perusal of the petition and it is a point of law which this court is bound to consider before addressing any other issue arising from the petition.

17. A look at the petition amended on 26<sup>th</sup> May, 2015 reveals that the petitioner's main complaint related to the 2<sup>nd</sup> respondent's decision to abandon the recruitment process initiated by an advertisement carried in the Daily Nation of 20<sup>th</sup> August, 2013 seeking to fill the post of Chief Officer Finance and Economic

planning and the second advertisement for an expanded position of Chief Officer Finance, Economic Planning and Marketing.

18. The petitioner averred in paragraph 10 and 11 of the petition that the respondent's aforesaid decision was mischievous; amounted to discrimination and favouritism and was in breach of the provisions of the *Constitution* and the *County Government Act (CGA)*. And though he proceeded to set out particulars of the alleged breach of the *Constitution* and the *CGA*, he did not state the particular provisions of the *Constitution* and the *CGA* that the 2<sup>nd</sup> respondent had violated and the manner of the alleged violation.

19. In *Anarita Karimi Njeru V Attorney General (1979) KLR 54* which was recently cited with approval by the Court of Appeal in *Mumo Matemu V Trusted Society of Human Rights Alliance & 5 others Civil Appeal No. 290 of 2012 (2013) eKLR*, it was held that a person who alleges that his rights had been violated is obliged to state his complaint, the provisions of the *Constitution* he considers to have been violated and the manner in which he believes his constitutional rights had been infringed.

20. In the *Mumo Matemu case (Supra)*, the Court of Appeal declined to uphold a petition which had been filed in the High Court on grounds inter alia, that it was not pleaded with precision as required in constitutional petitions and that it failed to provide adequate particulars of the claims related to the alleged violations.

21. To buttress the need and importance of clarity and precision in constitutional petitions, the Court of Appeal expressed itself as follows;

***“...it was the High Court’s observation that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting”. Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. in our view, it is a misconception to claim as it has been in recent time with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the Civil Procedure Act (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (Supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle..”***

22. The Court of Appeal in describing the petition that had been filed before the High Court stated as follows;

***“The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1<sup>st</sup> respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars”.***

23. In this case, the Amended Petition referred to Articles 10, 22, 27, 35, 46, 47, 48, 56, 73, 74, 75, 76, 78, 201, 232 and 235 in its title but not a single of these provisions were cited in the body of the petition. The petitioner did not expressly state which rights guaranteed by the constitution were infringed by the 2<sup>nd</sup> respondent in relation to the complaints made in paragraph 10 and 11 of the petition and how they were allegedly violated. He pleaded that there was lack of transparency, failure to observe national values including observance of human dignity, equity, human rights, non-discrimination; failure to uphold good governance, integrity, accountability, failure to act in an efficient and effective manner and failure to observe accountable administrative action but did not give any details or particulars to lay a basis for

those complaints or state the manner in which, in his view, those rights or national values had been violated. So the question I find myself asking is – how is the court expected to adjudicate on such omnibus or general complaints which appear to cover almost the entire Constitution but which are not supported by any particulars? How for instance would a court adjudicate without particulars claims that the respondents infringed on the petitioner’s right to human dignity, equity, undisclosed human rights, failure to observe good governance and integrity particularly when it is borne in mind that the petitioner did not participate in the impugned recruitment process.

24. In my opinion, a court should not be left to guess or speculate on which Articles of the Constitution may have been violated and how the same could have been violated given the circumstances presented in a petition. As demonstrated earlier, it is the petitioner’s duty to state with sufficient precision which provisions of the Constitution had been violated and the way they had allegedly been violated. This is so because court orders cannot be issued in a vacuum. They must be based on a situation or set of facts which points to a violation of a specific right or rights.

25. I have noted that in the submissions made on behalf of the petitioner, there was an attempt to remedy the defect in the petition by his advocates on record citing various Articles of the Constitution and demonstrating the infringement alleged. But submissions are not pleadings and they cannot take the place of pleadings.

26. It must be clear by now that I have come to the conclusion that the instant petition is incompetent for having failed to meet the threshold of clarity and precision required in constitutional petitions. This finding would have been sufficient for me to dispose of this petition by striking it out with or without costs but I choose not to take that path because I think it is important to address, albeit briefly, what appears to be the gravamen of the petitioner’s grievance in the petition.

27. From what I can discern from the Amended Petition and the petitioner’s submissions, the gist of the petitioner’s complaint is that the respondents wasted public resources by advertising for the same position twice without giving any reason and that this offended the national values of transparency, good governance and accountability contained in *Article 10* of the *Constitution*; that the whole recruitment process did not comply with the requirements of fair administrative action in that the second advertisement was tailored to favour a certain person who had not allegedly responded to the initial advertisement.

28. Having considered the submissions made on behalf of the parties, I take the following view of the matter.

Under *Article 235* of the *Constitution*, County Governments are empowered to inter alia establish and abolish offices in their public service. This power is delegated to County Public Service Boards established under *Section 57* of the *County Government Act*.

29. The functions and mandate of the County Public Service Board established for each county are enumerated under *Section 59* of the *County Government Act* which includes establishing and abolishing offices in the county public service and appointing persons to hold or act in the County service. What this means in my view is that the respondents had a statutory duty and mandate to decide which offices to create that would best serve the interest of the County Government of Nandi and what qualifications were required from persons to be appointed to those offices or posts.

30. I say so because the County Government Act does not set out any eligibility criteria for persons to be appointed to fill most positions in the County Public Service including the post of Chief Officers. In the circumstances, given the respondents position that the 1<sup>st</sup> advertisement did not attract qualified persons to offer the services that were required by the county and considering that it was only the 2<sup>nd</sup> respondent who had the legal authority to determine what those qualifications were, it is my view that the respondents were allowed by the law to re-advertise for the same position or for an expanded or new position provided that this was done in good faith and in the best interests of the county. The allegation by the petitioner and the interested party that the 2<sup>nd</sup> advertisement was designed to favour a person who

did not respond to the initial advertisement was not substantiated by any evidence. The name of the alleged preferred candidate was not even disclosed.

31. In the absence of evidence to demonstrate that the 2<sup>nd</sup> advertisement which was for a slightly different position from the one advertised earlier was done in bad faith for reasons other than attracting the persons who had the academic credentials and skills required to serve the needs of the county, I am unable to find any merit in the petitioner's claim that such an advertisement was an imprudent use of public resources. I do not also find any substance in the contention that the second advertisement denied the candidates who had been interviewed for the initial post of equal protection and benefit of the law because they were also at liberty to submit their applications for the re-advertised position. The respondents did not bar them from participating in the second recruitment exercise.

32. The petitioner also complained that the respondents' actions violated his right to fair administrative action. The right to fair administrative action is guaranteed by *Section 47 (1) of the Constitution* which in so far as is relevant to this petition states as follows;-

***(1) "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."***

33. Pursuant to *Article 47 (3)*, parliament has now enacted the *Fair Administrative Action Act No. 4 of 2015*. Section 2 of that Act defines administrative action to include;

***(i) the powers, functions and duties exercised by authorities or quasi judicial tribunals; or***

***(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;***

34. In this case, the petitioner has failed to demonstrate how the impugned recruitment process adversely affected the residents of Nandi County, or how it affected him either in his individual capacity or as a resident of Nandi County or how it was inefficient, unlawful, unreasonable and procedurally unfair.

35. The petition confirms that the 2<sup>nd</sup> respondent followed the law as set out in *Section 66 of the County Government Act (CGA)* which required it to invite applications through advertisements or other modes of communication whenever there was need to fill a vacant office in the County. The respondents followed this procedure when they wanted to fill the position of Chief Officer Finance, Economic Planning and Marketing.

36. The procedure stipulated under *Section 66 of the CGA* was meant to ensure that there was fairness and transparency in the recruitment processes undertaken by County Governments'. And the respondents having followed that procedure to the letter cannot be said to have acted unlawfully or unfairly or in a manner that did not promote transparency. Further, the petitioner did not prove or even suggest that he had requested, under *Section 6 of the Fair Administrative Action Act*, to be supplied with reasons why the respondents abandoned the first recruitment process and that his request was declined. It is therefore my finding that the petitioner completely failed to prove that the respondents contravened in any way the right to fair administrative action.

37. Finally, I wish to observe that the petitioner did not also adduce any evidence to demonstrate that the respondents failed to observe the principles of good governance and accountability when conducting the impugned recruitment process.

38. For the foregoing reasons, I find that even if I had not found the petition to be incompetent, it would still not have succeeded on its merits. Consequently, the petition is hereby dismissed.

39. On costs, since the petitioner had filed the petition in the public interest, I find that even though I have found that the same was devoid of merit, he should not be punished by being condemned to pay costs of the petition. Therefore, the order that best commends itself to me is that each party shall bear its own costs.

40. It is so ordered.

**C.W. GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 29<sup>th</sup> day of September 2016**

In the presence of:

Mr. Magut for the interested party and holding brief for Mr. Momanyi for the petitioner.

Mr. Komen holding brief for Ms Chesoo for the respondents.

Ms. Naomi Chonde Court Clerk.