REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 22 OF 2014

ANDREW SHIROKO SHILENJE.....PETITIONER/APPLICANT

VERSUS

COUNTY GOVERNMENT OF KAKAMEGA

THE KAKAMEGA COUNTY PUBLIC SERVICE BOARD……...RESPONDENTS

R U L I N G

INTRODUCTION

1. On 19/11/2014, ANDREW SHIROKO SHILENJE, the Petitioner herein filed a Constitutional Petition evenly dated under Articles 23,27,35 and 47 of the Constitution of Kenya.

2. The Petition is challenging the acts of the Respondents which the Petitioner claims to have denied him the undisputed opportunity of becoming the Ward Administrator for Ingotse- Ematiha Ward within Kakamega County.

3. Simultaneously with the Petition, the Petitioner filed a Notice Motion evenly dated seeking conservatory Orders which application was heard by way of written submissions thereby resulting into this ruling.

THE NOTICE OF MOTION

4. The Petitioner tailored the Notice of Motion in seeking several orders in the following fashion:-

1. ***That the present application be and is hereby certified urgent and ought to be heard on priority basis.***

2. ***That pending the hearing of this application inter partes there be a conservatory order of injunction restraining the respondents, their agents from re-advertising and receiving applications and subsequently carrying out fresh interviews for the position of Ward Administrator Ingotse-Ematiha Ward.***

3. ***That pending the hearing of this petition there be a conservatory order of injunction restraining the respondents, their agents from re-advertising and receiving applications and subsequently carrying out fresh interviews for the position of Ward Administrator Ingotse-Ematiha Ward.***

4. ***That costs hereof be provided for***.

5. The Notice of Motion (hereinafter referred to as "the application") was made on 11 grounds which appeared on the body of thereof as under:-

a. ***That the applicant applied for the job of ward administrator Ingotse-Ematiha ward.***
b. ***That the applicant attended the interview and was informed that he had emerged the best.***
c. ***That the applicant attended a briefing of the Governor at Golf Hotel and was informed to wait an appointment letter.***
d. ***That the applicant was surprised to see an advert in the local dailies re-advertising the position.***
e. ***That the respondents are bound by the provisions of the constitution and more specifically the bill of rights***
f. ***That the applicant was entitled to a fair administrative action and was supposed to be informed in writing of the decision to cancel the results of the interview that made him the winner.***
g. ***That no such notice or reasons were issued.***
h. ***That the applicants has been denied equal treatment of the law and condemned unheard***
i. ***That the petition and supporting affidavit***
j. ***That the respondents have relied on extraneous matters to deny the applicant an opportunity to serve as a ward administrator.***

6. The application is supported by the Petitioner's Affidavit sworn on 19/11/2014 and a Supplementary Affidavit sworn on 02/12/2014.

7. The Petitioner depones that he applied for a position of a Ward Administrator for Ingotse- Ematiha Ward within Kakamega County vide his letter dated 21/10/2013 which is marked as exhibit "ASS-1" This was in response to the advertisement carried by the 2nd Respondent herein in the Standard Newspaper on 16/10/2013.

He depones further that in September 2014, or thereabout he received a call from one of the employees of the 2nd Respondent (the Kakamega County Public Service Board) that he had emerged the best and had been considered for the position. He also states that pursuant thereto he was invited alongside all other persons who had so qualified to meet the Governor who eventually addressed them and advised the Petitioner to wait for his appointment letter.

8. To his utter shock and surprise, he saw another advertisement in the local dailies on 07/11/2014 calling for fresh applications for the position he had applied for and was asked to await for his appointment letter. He contends that he was not at anytime given any reasons before the decision to re-advertise was made neither was he given any opportunity to be heard before that decision. It is his further contention that the Respondents' acts were discriminatory since they reached the decision based on extraneous matters raised by one HABIL AMBUNDO through an Affidavit sworn on 24/10/2014 which the Petitioner exhibited as "ASS-4". To him, he remains a good citizen who has never been charged or convicted by any Court of law and that he has a Certificate of Good Conduct form the Police.

<u>THE RESPONSE</u>

9. In opposing the said application, the Respondents filed a Replying Affidavit sworn by one DIANA WAKONA on 28/11/2014 who described herself as the Interim Secretary to the Kakamega County Public Service Board.

10. The deponent saw the application as without substance, instituted in bad-faith and a waste of Court's time. It is admitted that the 2nd Respondent placed a Newspaper advertisement sometimes in 2013 calling for applications from suitable candidates for the position of Ward Administrator for Ingotse- Ematiha Ward, North Butsotso Location within Kakamega County. The Petitioner applied and was subsequently shortlisted and interviewed. It is further admitted that the Petitioner emerged the best candidate with a total score of 74.1% although various issues of credibility had been raised against him. A confidential report thereto was annexed as exhibit "DW-3".

11. The Respondents denied the allegations of communicating with the Petitioner that he had emerged the best and that he had been considered for the position further to remaining unaware of the allegation of the Governor meeting or informing the Petitioner to wait for his letter of appointment. It is deponed that the 2nd Respondent always notifies all successful candidates in writing and not otherwise.

It is further deponed that sometimes in October 2014, the 2nd Respondent received a delegation from the Ingotse- Ematiha Ward with a sworn Affidavit by one Habily Ambundo Mwadi sworn on 24/10/2014 having several credibility issues against the Petitioner. That Affidavit is the one annexed by the Petitioner in his supporting Affidavit as Exhibit "ASS-4".

12. The 2nd Respondent depones that the delegation aforesaid was received by one of its members a Col. (Rtd) Job Akhulia, OGW whom after listening advised them that their concerns will be addressed by the 2nd Respondent upon affording the Petitioner an opportunity to defend himself. The said Col. (Rtd) Job Akhulia swore an Affidavit detailing what happened which is marked as Exhibit "DW5". This Affidavit depones that on the very day the said Job Akhulia received the delegation from Ingotse-Ematiha Ward; the Petitioner passed by the 2nd Respondent's offices and met him. It is the Petitioner who told the said Job Akhulia that he had been served with an Affidavit by the said Habilly Ambundo Mwandi which said Affidavit was in his possession and on checking the 2nd Respondent's records, he found that the Affidavit was the same as that which had been served upon him earlier by the delegation. He advised the Petitioner to prepare his response to the allegations raised in the Affidavit. The Petitioner promised to serve the 2nd Respondent immediately.

13. The said Diana Wakona proceeded to depone that given the fact that the Petitioner did not respond to the allegations contained in the Affidavit which was in his possession, then that in itself was an admission of the issues raised therein and the principle of estoppel ought to be invoked accordingly. She further denies the applicability of the principle of legitimate expectation in the circumstances of the case and further denies that the Respondents did not breach Article 47 of the Constitution.

14. It was further deponed that the 2nd Respondent was mandated under the County Government Act to exclusively undertake the recruitment process including carrying out any re-advisement and hence there was nothing wrong with the way the 2nd Respondent handled the issue at hand.

She urged the Court not to find for the Petitioner as under Section 77 of the County Government Act this Court lacks the jurisdiction to hear or entertain the entire Petition and the application and further that public interest miliates against the Petitioner.

THE SUPPLEMENTARY AFFIDAVIT

15. The Petitioner in a rejoinder filed a Supplementary Affidavit with the leave of this Court. Among the issues he raised therein, he confirms that upon coming across the Affidavit of Ambundo he visited the 2nd Respondent on his own volition and intent and that he was not called by the 2nd Respondent to confirm whether the Affidavit by Ambundo was on record. He was however advised to make his response thereto. He depones that he was in the company of his Assistant Chief and the Chairman Butsotso Council of Elders of which he is its Secretary. He also confirms that he made a sworn response to the Affidavit of Ambundo but to him the 2nd Respondent has its mind fixed on not hiring him and that is why the 2nd Respondent ignored his said sworn response. He contended that he ought to have been given the responsibility of serving the residents of Ingotse-Ematiha Ward instead of re-advertising the position.

THE PETITIONER'S/APPLICANT'S SUBMISSIONS

16. The Petitioner filed his submissions in urging this Court to grant the conservatory orders. He admitted that he had not been issued with a letter of appointment though. He avers that if the conservatory orders are not granted he stands to suffer as he was not notified before the drastic action was taken against him given that it is admitted that he had emerged the best candidate and that the position shall be taken out by another person if the interviews proceed.

The Petitioner contends that the matter raises weighty constitutional issues which ought to be considered by this Court and that the same are not frivolous by any standard whatsoever. He relied on the Supreme Court's decisions of **George Mike Wanjohi -vs- Steven Kariuki & 2 Others, Civil Application No. 6 of 2014 (unreported)** and **Peter Munya vs I.E.B.C Others.**

THE RESPONDENTS' SUBMISSIONS

17. In urging this Court to dismiss the application, the Respondents argued that the Petitioner had failed to prove any prima –facie case since he had failed to prove what right had been or was likely to be infringed by the administrative action. Further, it was argued that the Petitioner had failed to demonstrate that he had a legitimate expectation which was infringed. The decision of **Nrb HCC Petition No. 88 of 2010 Multiple Hauliers East African Ltd –vs- Attorney General & 10 Others** and **Nrb HCC Petition No. 592 of 2013 Salome Mwihaki Njenga & 4000 Others -vs- The Hon. Attorney General & 3 others (unreported**) were relied on for that submission.

18. The Respondents further contended that the decision taken by the 2nd Respondent towards re-advertisement was within the law was sanctified by various sections of the County Government Act and that having re-applied for the same position the Petitioner does not stand to suffer any prejudice. This Court was urged to consider the balance of convenience between private interests and public interest and to find in favour of the Respondents and to dismiss the application.

ANALYSIS AND DETERMINATION

On whether this Court has jurisdiction:

19. Before Ideal with the merits or otherwise of the application, I would wish to deal with a preliminary issue as raised by the Respondents in paragraph 23 of the Replying Affidavit of Diana Wakona to the effect that this Court lacks the jurisdiction to entertain this matter by dint of Section 77 of the County Government Act given that the Applicant had not exhausted all available avenues in resolving the dispute and that there are no constitutional issues raised in the matter or at all.

20. Section 77 of the County Government Act No. 17 of 2012 (hereinafter referred to as "**the Act**") states as follows: -

> ***"(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")***
>
> ***(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 qualification attached to any office;***
> >
> > ***(b) remuneration and terms and conditions of services,***
> >
> > ***(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 an appeal in that regard.

(3) An appeal under subsection (1) 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 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 mad 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."

It is the Respondents' position therefore that the Petitioner being dissatisfied with the decision of the 2nd Respondent to re-advertise the position of the Ward Administrator of Ingotse- Ematiha Ward then the only available avenue was to institute an appeal to the Public Service Commission and not to file the current proceedings. It is submitted that the jurisdiction of the Court has therefore been ousted accordingly.

21. I do not think that the Respondents were making any serious submission on this issue. I say so because Article 2 of the Constitution is very clear. It states as follows: -

"2(1) The Constitution in the supreme law of the Republic and binds all persons and all State organs at both levels of government.

(2).....

(3).....

(4) Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

(5).....

(6).....

22.The High Court is established under Article 165 of the Constitution. Under Article 165(3), the jurisdiction of the High Court is defined as follows: -

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied,violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the

subordinate courts and over any person, body or authority exercising ajudicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration justice.

23.Under Article 165(3)(b) and (d), the High Court is called upon to deal with issues of whether

rights 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. This jurisdiction is further provided for under Article 23 of the Constitution. The Bill of Rights and fundamental freedoms are provided for under Articles 26 to 57 inclusive of the Constitution. The Petition in issue has been brought claiming the 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.

On the application

24. The application before Court is for conservatory orders. The Courts have over time now established several principles which ought to be considered in determining whether or not to grant conservatory orders. Hon. Richard Mwongo, PJ, in **Martin Nyaga Wabora vs Speaker of the County Assembly of Embu & 3 others (2014) eKLR** had an occasion to look at this issue and identified three principles being that the Applicant ought to demonstrate *prima facie* case with a likelihood of success, whether if a conservatory order is not granted the matter will be rendered nugatory and the issue of public interest.

The Court had the following to say: -

> ***"53. In determining whether or not to grant conservatory orders, several principles have been established by the courts. The first is that:***
>
> *"(an applicant) must demonstrate that he has a prima facie case with likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."*
>
> ***This.....***
>
> ***60.....***
>
> ***61. The second principle, which naturally follows the first is whether if a conservatory order is not granted the matter will be rendered nugatory.***
>
> ***62. The third principle is one recently enunciated by the Supreme Court in the election petition case of Gatirau Peter Munya vs. Dickson Mwenda Githinji & 2 others SCK Petition No. 2 of 2013. The principle is that the public interest must be considered before grant of a conservatory order. Ojwang and Wanjala JJSC stated that:-***

"(86) 'Conservatory Orders' bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions liked to such private party issues as "the prospects of irreparable harm" occurring during the pendency of a case, or 'high probability of success' in the Applicant's case for order of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant cases".

25. Hon. Musinga, J (as he then was)in **Nrb High Court Petition No. 16 of 2011 Centre for Human Rights Education and Awareness (CREAW) & 7 Others vs Attorney General (unreported)** stated as follows –

> "***At this stage, a party seeking a conservatory order only require to demonstrate***

that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger the he will suffer prejudice as a result of the violation or threatened violation of the Constitution."

In Okiya Otatah Okoiti Vs Attorney General & Another (2012) eKLR Hon Majanja, J stated that in granting conservatory orders a Court is to balance all the competing issues.

26. In the case of **Robert N. Gakuru & Another -vs- Governor Kiambu County & 3 Others (2013) eKLR**, Hon. Odunga, J expressed himself thus:-

"21. Conservatory orders in my view ought to be granted only when the refusal to grant the same is likely to imperil the petitioner. Where the issues raised by the petitioner may still be successfully violated even if this stay sought is not granted and an appropriate and efficacious remedy granted, this court ought not to necessarily interfere with the work of the other organs of Government especially if what is challenged is the core mandate of such organs..."

The Court in **Njuguna -vs- Minister for Agriculture Civil Appeal No. 144 of 2000 (2000) 1 EA 184**, held that in an application for conservatory order, just as in cases for leave, the Petitioner ought to establish a prima facie arguable case. However it warned against going into the merits of the matter in depth at that stage and stated that the Court should not rule on the merits of the application yet to come, as it would then be going beyond the ambit of its jurisdiction, at that time, by ruling on substantive issues.

27. From the above analysis on the instances in which this Court can safely grant conservatory orders, this Court shall now look at the three said principles independently and as under: -

a. **On the *prima facie* case:**

28. The issue of what constitutes a *prima-facie* case was dealt with by the Court of Appeal in **Mirugi Kariuki -vs- Attorney General Civil Appeal No. 70 of 1991 (1990-1994) EA 156, (1992) KLR 8** as follows:-

"It is wrong in law for the court to attempt an assessment of the sufficiency of an applicant's interests without regard to the matter of his complaint. If he fails to show, when he applies for leave, a prima –facie case, on reasonable grounds for believing that there has been a failure of public duty, this court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables this court to prevent abuse by busy-bodies, cranks and other mischief-makers... In this appeal, the issue is whether the applicant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of this Act was brought into question. Without a rebuttal to these allegations, this appellant certainly disclosed a prima- facie case. For that, he should have been granted leave to apply for the orders sought."

In the case of **Re Bivac International SA (Bureau Veritas)(2005) 2 EA 43,** the Court stated that a *prima-facie* case or arguable case is not arrived at by the Court by tossing a coin or waving a magic wand or raising a green flag, but its ascertainment is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the remedy sought, the grounds and the possible principles of law involved.

29. The Petitioner alleges that having emerged the first one in the interviews conducted for the position of a Ward Administrator for Ingotse-Ematiha Ward, the 2nd Respondent acted in breach

of Article 47 of the Constitution in arriving at the decision of re-advertising for the said position without him being given an opportunity to be heard. That fact is admitted to the extent that he emerged the first one in the said interviews. I agree with the Respondents' Counsel that for one to take refuge in Article 47 of the Constitution, one must clearly demonstrate the right or fundamental freedom likely to or actually infringed. That is the plain meaning of Article 47(2) which states as follows:-

> ***"47(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".*** (emphasis added).

30. The interview was part of a process carried out by the 2nd Respondent which was to end up with a possible successful Applicant. Likewise, it was open for the 2nd Respondent to return a finding of not having found a suitable candidate for the position and either to re-advertise or even call for a secondment. That duty is vested in the 2nd Respondent by the law under the County Governments Act (hereinafter referred to as **'the Act'**). This duty culminates with the compliance with Section 67 of the Act which states that:-

> "***No appointment or assignment of a duty in a County Public Service shall be valid unless it is evidenced in writing."***

It is therefore clear that any rights would crystallize once the process is complete and an appointment letter is issued to the successful applicant. In arriving at this end, the 2nd Respondent is not only required to comply with the Act but also with the Constitution of Kenya. The Act elaborately deals with the various requirements and compliance standards to be met for an appointment to be made. However, this Court will not go into the merits or otherwise of the process in issue in view of the foregone legal warning.

31. Once an employer-employee relationship is created subsequently rights do arise therefrom. A party would at that point in time be entitled to call into the refuge of Article 47 of the Constitution if those rights are either violated or threatened with such violation. In our case, the Petitioner has failed to clearly show the right(s) or fundamental freedom(s) allegedly trampled upon by the Respondents. I fully associate myself with the Court in the case of **Mathew Okwanda vs Minister of Health and Medical Services & 3 others Nrb High Court Constitutional Petition No. 94 of 2012** when it clearly expressed the above position in law.

32. A party can however demonstrate its rights or fundamental freedoms as above demonstrated or in the circumstances of this particular case, upon reliance on the doctrine of legitimate expectation. I have addressed my mind to the said principle and have not seen how the Petitioner may benefit from the same. However a brief look at the doctrine would suffice.

33. Legal experts have stated that the doctrine of legitimate expectation is intended to give relief to a party who is not able to justify its claims on the basis of pre-application of statutory law, though one has suffered a civil consequent because a certain lawful promise had been made by a Respondent or a party in dispute and which promise has not been fulfilled. **H.W.R Wade and C.F. Forsyth in ADMINISTRATIVE LAW, 10th Edition** at page 449 states that:-

> ***"It is not enough that an expectation would exist; it must in addition be legitimate. But how is it to be determined whether a particular expectation is worthy of protection? This is a difficult area since an expectation a reasonably entertained by a person may not be found to be legitimate because of some countervailing consideration of policy or law".***

Hon. Musinga, JA in his dissenting judgment in the case of **Royal Media Services Limited v Attorney General & 8 others (2014) eKLR** stated that:-

"I may also add that legitimate expectation, however strong it may be, cannot prevail against express provisions of the Constitution. If a person or a statutory body promises a certain relief or benefit to a claimant or undertakes to do something in favour of a claimant but in a way that offends the constitution, the claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or the promise".

Hon. Maraga, JA in his judgment which carried the day by majority in the above case and in approval of the High Court case of **Joel Nyabuto Omwenga & 2 others vs Independent Electoral& Boundaries Commission & Another (2013) eKLR** expressed himself thus:-

... "for a legitimate expectation to arise, the decision of the administrative authority must affect the person by depriving him of some benefit or advantage which either:-

i. ***He had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do and until there has been communicated to him some rational grounds for withdrawing it or which he has been given an opportunity to comment; or***
ii. ***he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn".***

34. On the forgone analysis, I find no basis for or evidence of the Petitioner having been given an expectation by the Respondents that he would he awarded the post of a Ward Administrator for Ingotse- Ematiha Ward. First, 2nd Respondent has denied calling the Petitioner on phone and informing him that he had been considered for the job. It contends, and rightly so, that all its decisions are made in writing. Second, the alleged meeting with the 1st Respondent's Governor has been equally denied. Further, there is no evidence at all on how the said meeting was convened and held neither has the Petitioner called in the assistance of those he alleges attended the same. To the Respondents, that meeting, if at all it may be held, can only arise once the recruitment process is complete and an appropriate appointment made in writing. Further, the Governor is not a party in these proceedings. Third, there is no any assurance by the Respondents that the recruitment of the Petitioner will not be withdrawn before according him an opportunity to be heard. I reiterate to say that the 2nd Respondent was in the process of undertaking a recruitment exercise and in the circumstances the doctrine of legitimate expectation falls short of the Petitioner's aid.

35. As the above analysis reveal that the Petitioner has failed to demonstrate any specific right or fundamental freedom that was or was likely to be affected by the Respondents' actions and equally failed to bring himself within the aid of the doctrine of legitimate expectation, this Court therefore has no alternative but to find that the Petitioner has failed to demonstrate a *prima facie* case.

b. **On whether there is a real danger that the Petitioner will suffer if the conservatory order is not granted:**

36. Having found that the Petitioner has failed to demonstrate which of his right(s) or fundamental freedom(s) stood to be infringed or threatened by the alleged administrative actions, equally the danger that the Petitioner stands to suffer has not been demonstrated. The Petitioner has not been locked out of the process. The job was re-advertised and he equally applied and gave his response to all the allegations raised against him. The 2nd Respondent has not finalized that process and there is no evidence tendered that the Petitioner stands to or is likely to be discriminated against in the said recruitment process.

Further, the main Petition is yet to be heard. In the event the Petitioner successfully demonstrates that his right(s) or fundamental freedom(s) were infringed or threatened, this Court has jurisdiction

to grant such appropriate remedies including damages.

c. **On Public interest:**

37. The recruitment process is aimed at aiding devolution take its centre-stage in the Country. The position of a Ward Administrator is quite crucial in the operations of the 1st Respondent and the process of coming up with such a person is statutorily vested under the 2nd Respondent. Given the analysis of the two preceding principles, public interest demands that the recruitment process do proceed on. The people of Ingotse- Ematiha Ward need to get their representative in place and that can only be achieved by allowing the 2nd Respondent to discharge its legal statutory mandate. As already stated the way the 2nd Respondent undertakes such a duty shall be succinctly dealt with in the main Petition.

CONCLUSION

38. The upshot is that the application by Notice of Motion dated 19/11/2014 be and is hereby dismissed and the interim orders issued herein are hereby discharged and vacated accordingly. Costs of the application to be in the main Petition.

DATED AND SINGED AT KAKAMEGA THIS 17TH DAY OF FEBRUARY 2015.

A. **C. MRIMA**

JUDGE

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 19TH DAY OF FEBRUARY 2015.

RUTH N. SITATI

JUDGE