



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 283 OF 2014

JAMES TINAI MURETE,

GIDEON MEYOKI & OTHERSPETITIONERS

VERSUS

COUNTY GOVERNMENT OF KAJIADO.....1ST RESPONDENT

KAJIADO COUNTY PUBLIC SERVICE BOARD.....2ND RESPONDENT

AND

NAILANTEI SUPEYO & 19 OTHERS.....INTERESTED PARTIES

JUDGMENT

Introduction

1. The petitioner filed the present petition to challenge the decision of the respondents to make certain appointments to the County of Kajiado. They describe themselves as tax payers, registered voters and residents of the County of Kajiado and have filed the petition in their own interest and in the interests of the residents of Kajiado County. They state that the petition seeks to protect, in particular, the interests of the residents of Ewaso OO Nkidong'I and Keekonyokie wards in Kajiado West.
2. The petition is brought against the 1st respondent, the county government of Kajiado, one of the forty seven county governments established under the Constitution, and the 2nd respondent, a body corporate established under the County Government Act, 2012.
3. The petitioners challenge various appointments that were made by the respondents. They allege that their clan was being discriminated against by being given very few slots in the county jobs; and further, that the appointments in question are unconstitutional for not abiding by the two-thirds constitutional requirement and not being a reflection of the representation of the county.

Litigation History

4. By their application dated 26th June, 2014, the petitioners sought conservatory orders to restrain the respondents from making any appointments or confirming the appointment of any persons in Kajiado County pending the hearing and determination of the petition. They also prayed that the respondents be ordered to provide them with a list of the applicants and the persons confirmed for appointment in positions already awarded to Ewaso OO Nkidong'I and Keekonyokie wards. They also sought the list showing the ranking of all applicants in the interview for positions already awarded to the two wards.
5. On 14th July, 2014, an application for joinder of Nialantei Supeyo, Nkoitai Ole Moita, Sarah Nchoki, Jackson Ritei, Morris Kaaka, Dicksoin Ntikoisa, Paul Sorimpan, Luka Ole Ndilai, John Ole Naigeyo, Hamilton Parseina, Molonket Kinayia, Joseph Torinke Neeiliang, Saitabao Shonko, Leipa Shukuru, David Sempuan, Wilson Semeyian Ilanet, Silas Lekuka, Paul Semenkur and Moses Shomet Tinkoi as interested parties was made, and allowed. On 14th August, 2014, the parties sought time to attempt an amicable resolution of the matter, which was ultimately unsuccessful, thereby necessitating the hearing of the petition, in respect of which this judgment relates.

The Case for the Petitioners

6. The petitioners set out their case in the petition dated 26th June, 2014, the supporting affidavit sworn by James Tinai Murete and Gideon Meyoki on the same date, and a further affidavit sworn by the same deponents on 5th August, 2014. Oral and written submissions were also made on their behalf.

7. The petitioners aver that the Maasai community in Kenya consists of two antagonistic clans, the Orok Kiteng' and Odo Mong'I, who are unevenly spread all over Kenya including Kajiado County. The clans were, according to the petitioners, mainly supposed to maintain the authenticity of the Maasai culture and family ties through intermarriages. These two main clans cut across all the Maasai sub clans living in Kenya and Tanzania. Kajiado County's population also has a combination of other tribes in Kenya including the Kikuyu, Kamba, Somali, Luo and Luhya.

8. The petitioners depose that due to politics and the spread of tribal divisions in Kenya, the two clans started competing for power and control over resources. The competition and rivalry has built tremendously, with each clan seeking to dominate and oppress the others. They contend that the rivalry between the clans is evident in the appointment of county officials by the 1st respondent.

9. To illustrate, the petitioners contend that since the establishment of the county government, 24 positions have been granted to the Ewaso OO Nkidong'I and Keekonyokie wards. They claim that they were among the applicants for the 24 positions advertised for the two wards, but that the respondents employed 20 people from the Odo Mong'I clan and the remaining 4 from the Orok Kiteng' clan.

10. They argue that the respondent employed Peter Ole Ntiaki as a Payroll Manager, a position which at the moment is being shared with someone from Machakos County. Their contention is that this was intended to mislead the county residents on the issue of fair distribution of jobs. They further argue that the position given to one Kiano Ole Mopel is a mere casual position which will be terminated anytime. It is their case therefore that the respondents, by their actions, intended to ensure that the Orok Kiteng' clan from the Ewaso OO Nkidong'I and Keekonyokie ward do not benefit from the county appointments.

11. The petitioners further contend that several qualified professionals from Orok Kiteng' clan in Ewaso OO Nkidong'I and Keekonyokie wards who applied for the said positions, were shortlisted and emerged the best in the interviews, were denied employment. They argue that this was despite the fact that they are highly qualified and had experience in the positions they had applied for. They cite several individuals from their clan whom they allege had degree qualifications at Bachelors or Masters levels, as well as diploma holders, in addition to experience, but were not given positions by the respondents.

12. The petitioners submit that in making the appointments in question, the respondents failed to adhere to the two-thirds gender rule as prescribed in the Constitution, and did not consider persons with disabilities. It is their case further that due to the uneven appointments, persons from other ethnic communities such as the Kambas, Kikuyus, Somali, Luos and Luhyas were completely marginalized in the said appointments. They contend that they are further disadvantaged by the fact that the members of the County Assembly representing their wards are from the dominating Odo Mong'I clan.

13. The petitioners contend that through the appointments made, which excluded members of their clan, they would be discriminated against in violation of their constitutional right to equality; their clan would suffer serious discrimination in allocation of contracts and tenders in the county and they would continue to face discrimination for years to come as the said positions will be occupied by the Odo Mong'I clan. They therefore urged the Court to allow the petition and grant them the following orders:

- a. ***A declaration nullifying all appointments made and approved by the respondents in relation to Ewaso OO Nkidong'I and Keekonyokie wards to the extent that they contravene, infringe and curtail the petitioners' right.***
- b. ***A declaration directing that the respondents do re-advertise and refill the positions awarded to Ewaso OO Nkidong'I and Keekonyokie wards and in so-doing do adhere to the constitutional provision relating to rational balance.***
- c. ***A declaration that all those appointments made in the 24 slots awarded to Ewaso OO Nkidong'I and Keekonyokie wards were null and void.***
- d. ***A declaration that all further appointments by the County Public Service Board do adhere to the constitutional provision of equality and inclusivity.***
- e. ***Any further orders, directions and remedies as this Honourable Court may deem fit and just in the circumstances.***

The Case for the 1st Respondent

14. The 1st respondent opposes the petition and has filed an affidavit sworn by the County Secretary, Dr. Kennedy Ole Kerei, on 4th August, 2014. Submissions dated 14th August, 2014 were also filed on its behalf.

15. Dr. Ole Kerei deposes that the 1st respondent has the mandate, in collaboration with the 2nd respondent, to provide for organization, staffing, and functioning of the county public service in ways that ensure efficient, quality and productive services for the people of the county. This mandate includes ensuring that the county government has competent, qualified and skilful employees, and rating and establishing the public service for the county in accordance with the Constitution and the County Government Act, which clearly set out the key factors to be taken into consideration in carrying out the appointment process.

16. It is also the 1st respondent's case that it has put in place a County Public Service Board in line with the provisions of the County Government Act. It is this Board that has carried out the work of filling vacant positions in the county. According to the 1st respondent, the

process was elaborate, transparent, fair and all inclusive. Dr. Ole Kerei sets out the steps taken in the process, which included, inter alia, that advertisements for the vacant positions were made in the dailies; short lists of candidates were published in newspapers and invitation for candidates for interviews was done; a report presented by the Governor to the County Assembly; and vetting by the Assembly undertaken. It denies that there was any discrimination against any member of any clan at any point, noting, however, that clannism is not a key factor nor a criteria for selection and appointment.

17. The 1st respondent makes further depositions with regard to the interviews, qualifications and ranking of various candidates to illustrate that they were qualified for the positions to which they were appointed, and that their appointment was subjected to the vetting process in the County Assembly. He deposes that at no point during the vetting process did the petitioners raise any concerns over any of the appointees, nor did they submit written objection as would be expected; that they were represented by their elected members during the vetting sessions, and silence on their part therefore meant concurrence on the outcome of the process.

18. The 1st respondent accuses the petitioners of being actuated by malice in bringing the present petition almost a year after the appointments in question were made. It was also its position that the matters being raised in this petition ought to have been raised before the Industrial Court as they relate to employment and labour issues. The 1st respondent argued further that the petitioners should have explored an amicable settlement through the procedure spelt out under Section 77 of the County Government Act, which provides that anyone dissatisfied with the decision of the County Public Service Board should appeal to the Public Service Commission. It therefore urged the Court to dismiss the petition with costs, arguing that the petitioners should not use the Court to settle political scores.

The Case for the 2nd Respondent

19. The 2nd respondent filed a notice of preliminary objection dated 11th July, 2014, a replying affidavit sworn by Mr. Moses Semera on 31st July 2014, a supplementary affidavit also sworn by Mr. Semera on 11th August, 2014 and submissions dated 13th August, 2014.

20. Like the 1st respondent, the 2nd respondent takes the position that this petition should have been filed in the Industrial Court (now the Employment and Labour Relations Court) in accordance with the Industrial Court Act, No 20 of 2011 as read with Article 162 (2) (a) of the Constitution. The petition was therefore premature, misconceived, incompetent and a complete nullity, that this Court lacks the jurisdiction to entertain it and should strike it out with costs.

21. Mr. Semera averred on behalf of the 2nd respondent that it was operationalized on or about October 2013, when the chairman and the other members were sworn in after nomination by the Governor and approval by the County Assembly. In exercise of powers conferred by Section 59 (1) of the County Government Act, the 2nd respondent advertised, interviewed nominated and appointed candidates for several positions in the County Public Service. The said appointments were made on the basis of merit, involved open and transparent recruitment, and took into account regional balance and the principle of affirmative action for both women and persons with disabilities.

22. The 2nd respondent agreed with the position taken by the 1st respondent that the existence of clans in the county was not a consideration for qualification to any of the advertised jobs as the clans referred to by the petitioners cut across the entire county; that members of each of the clans are unevenly spread in all areas of the county and cannot be easily identifiable with a particular region; that the clans inter-marry and it can be extremely tedious, and to some extent impossible, to know with certainty from which clan a particular person belongs. It was also its deposition that there had been no census at the national, county and/or village level to ascertain the number of members of a particular clan. Mr. Semera deposed that clanism was outdated and members of the elite in the county felt humiliated when asked which clan they came from.

23. The 2nd respondent denied the allegation by the petitioners that the alleged individuals from the Orok Kiteng' clan applied for positions, were shortlisted and emerged the best in the interviews but were denied employment. It maintained that the due process of the law was followed and the best candidates were shortlisted, interviewed and their names were forwarded and recommended to the Governor for consideration for nomination, vetting and appointment. Those who were not appointed did not qualify, and some had degrees which were not relevant to the positions applied for.

24. The 2nd respondent has also specifically responded to various claims in respect to individuals who applied but were allegedly not employed, noting that one was not shortlisted, one applied for recruitment to a position recruitment in respect of which was stopped by the Commission on the Implementation of the Constitution; one position had never been advertised, while another of the individuals mentioned by the petitioners ranked fifth. Recruitment to other positions to which the petitioners allege members of their clan were denied employment, according to the 2nd respondent, was not within its mandate. The 2nd respondent's position is therefore that the petitioners' allegations that they were discriminated against on the basis of their clan are baseless and unfounded; and that they have failed to discharge the onus of demonstrating that the respondents discriminated against them or abused their powers.

25. The 2nd respondent contended that the Court has a duty to foster unity but not to disenfranchise and disintegrate the county into amorphous units like clans in issues of employment of public officers to serve in the County; that the Board is guided by the Constitution and other relevant national laws in issues of employment; and that in the absence of proof by the petitioners of differentiation on legitimate grounds, there is no constitutional issue for the Court's determination.

The Case for the Interested Parties

26. The interested parties oppose the petition. They rely on affidavits, all sworn on 18th July 2014, by Lucy Yepe Tinkoi, Isiah Salojo Kaluuchu, George Kilalta Naisanka, Francis Sakuda, Titus Terta Ole Mama, Edward Mopel, Catherine Naimantat Metekai, Moses Leseyio Parsitau, James Rogei and Onesmus Mboye and an affidavit sworn on their behalf by Mr. John Ole Moyaki on 4th August 2014. They also filed two sets of submissions dated 5th and 12th of August 2014 respectively. The interested parties, all of whom were recruited to various

positions in the 1st respondent, state that they were recruited competitively, following a public advertisement, shortlisting, and interviews, all in accordance with the provisions of the County Government Act.

27. Mr. John Ole Moyaki, who was appointed the chairman of Kajiado County Public Service Board, avers that the grounds for his removal from office are clearly set out in Section 58 (5) of the County Government Act; that the grounds for nullifying such an appointment are set out in Article 251 (1) of the Constitution; and therefore he could not be removed on any of the grounds relied on by the petitioners.

28. Mr. Ole Moyaki made similar averments with respect to the appointment of the other interested parties, noting that they were all appointed in accordance with the relevant constitutional and legislative provisions, a recruitment process whose integrity the Court should protect; and further, that being public servants, the interested parties are protected by the provisions of Article 236 (b) of the Constitution from dismissal, removal from office or demotion in rank without due process. The interested parties further argued that it would be an affront to their right to fair labour practices under Article 41 (1) of the Constitution and their right to fair administrative action under Article 47 of the Constitution if the petition was allowed, and they urged the Court to dismiss the petition with costs.

Determination

29. I have considered the respective pleadings and submissions of the parties. The crux of the petitioners' case is that the appointments by the respondents have discriminated against the clan to which they belong in that their clan has been given very few slots in the said appointments.

30. It is worth observing at the outset that the petitioners have not raised any issues concerning the process that was followed by the respondents in the recruitment. Their grievance is essentially with respect to the merit of the decision made by the respondents. For the Court to enter into an inquiry on the merits, it would in essence be placing itself in the position of the respondents, and inquiring whether a particular candidate met the requirements for the job in question. It must be therefore understood from the outset that this is not something that this Court can properly do.

31. Having considered and set out the respective pleadings of the parties above, I believe that the main issue for determination by this Court is fairly straightforward: whether the respondents have violated the petitioners' right to non-discrimination and equal protection of the law, as well as the right to fair administrative action, by their appointments to various positions in the 1st respondent.

32. However, before considering this issue, it is necessary to consider the question of jurisdiction which has been raised by the respondents, their position being that this Court lacks the jurisdiction to determine this matter as it should have been filed before the Employment and Labour Relations Court, or that the petitioners should have pursued an appeal before the Public Service Commission.

33. I need not repeat the well-worn dictum of Nyarangi JA with respect to the importance of jurisdiction set out in the case of *Owners of the Motor Vessel Lillian S vs Caltex Oil (Kenya) Limited 1989 KLR 1*. In its **Advisory Opinion Reference No. 2 of 2013, Speaker of the Senate and Another vs The Attorney General and Others**, the Supreme Court stated as follows:

“Jurisdiction, in any matter coming up before a Court, is a fundamental issue that must be resolved at the beginning. It is the fountain from which the flow of the judicial process originates.”

34. The respondents have relied on the decision of the Court in **The Speaker of the National Assembly vs The Honourable James Njenga Karume, Civil Application No 192 of 1992 (UR)** and **James Akelerio Alias Muguu and Another vs Moses Kasaine Lenolkilal and 3 Others – High Court Petition No 17 of 2014**, to submit that by dint of Section 77 (2) of the County Governments Act, any person dissatisfied or affected by any decision relating to employment of persons, including a decision in respect of recruitment, selection, and appointment to any office made by the County Public Service Board, should appeal to the Public Service Commission against such decision. As the petitioners have not demonstrated having ever raised their grievances with the Public Service Commission, their present petition is an attempt to circumvent due process and is an abuse of the court process.

35. According to the respondents, though the jurisdiction of the High Court is unlimited, where there is clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, it should be strictly followed. Reliance is placed in this regard on the decisions in **Mayers and Another vs Akira Ranch Ltd (1972) EA 347**, **James Akelerio Alias Muguu and Another vs Moses Kasaine Lenolkilal and 3 Others (supra)**, **Moses Kinyua Miriti and 5 Others vs Igembe North District Staffing Office and 3 Others, Petition No 18 of 2013**, **Narok County Council vs Trans Mara County Council (2000) 1 EA 161** and **Stephen Wanyee Roki vs Kenya Airports Authority, HCCC No 1626 of 2001**.

36. It has also been argued that the Court lacks jurisdiction as, under Article 162 (2) (a) of the Constitution, the issues in dispute fall within the jurisdiction of the Employment and Labour Relations Court. The interested parties have also contended that the effect of granting the prayer sought by the petitioners would be to render them redundant.

37. The petitioners have responded to the arguments on jurisdiction by citing the case of **Nick Githinji Ndichu vs the Clerk, Kiambu County Assembly and Kiambu County Assembly, Petition No 11 of 2014** and **Mohlachua vs Hyper Home Center, 2008, 3 BLR IC** to submit that they are not employees of any of the respondents, do not provide any service whatsoever to them nor receive wages or salary from them, and the Employment and Labour Relations Court does not have jurisdiction under Section 12 (1) of the Industrial Court Act to hear them.

38. They further contend that the instant petition is brought by a community who may or may never be interested in the respondent's job opportunities but who are raising questions on the constitutionality of employment procedures that were adopted by the respondents in awarding County jobs to the said wards.

39. The Constitution provides at Article 165(5) that the High Court shall not have jurisdiction to hear and determine matters reserved for the courts of the status of the High Court established under Article 162(2), which provides as follows with respect to the jurisdiction of the Employment and Labour Relations Court:

Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

- a. ***Employment and labour relations***
- b. ...

40. The Court was established under section 4 of the Industrial Court Act, amended in 2014 to rename the Court as the Employment and Labour Relations Court. Section 4 states that:

1. ***In pursuance of Article 162(2) (a) of the Constitution, there is established the Industrial Court for the purpose of settling employment and industrial relations disputes and the furtherance, securing and maintenance of good employment and labour relations in Kenya.***
2. ***The Court shall be a superior court of record with the status of the High Court.***
3. ***The Court shall have and exercise jurisdiction throughout Kenya.***

41. The jurisdiction of the Court is set out at section 12 of the Act as follows:

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' organization and a trade unions organization;***
 - d. ***disputes between trade unions;***
 - e. ***disputes between employer organizations;***
 - f. ***disputes between an employers' organization and a trade union;***
 - g. ***disputes between a trade union and a member thereof;***
 - h. ***disputes between an employer's organization 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 organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose. (Emphasis added)***

42. Given the provisions of the Act set out above, can the present dispute be said to be between employers and employees, and therefore within the exclusive mandate of the said Court? A consideration of the definition of 'employers' and 'employees' leads to the conclusion that the answer must be in the negative. Section 2 of the Industrial Court Act defines an "employer" as "***any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company***". An 'employee' is defined as "***a person employed for wages or a salary and includes an apprentice and indentured learner.***"

43. The petitioners do not fall within the above definition. They do not have an employer-employee relationship with the respondents, nor do they fall into any of the other categories contemplated under section 12 of the Act. They cannot therefore lodge their grievance with the Employment and Labour Relations Court.

44. That notwithstanding, they are persons from the county aggrieved by the recruitment process undertaken by the county, and they allege violation of various rights under the Constitution, in effect challenging the constitutionality of the said appointments. I am therefore in agreement with the petitioners that this is not a matter that falls within the jurisdiction of the Employment and Labour Relations Court

45. The second limb of the jurisdiction question relates to whether the petitioners, being dissatisfied with the decision of the respondents,

should have filed a constitutional petition, or whether they had an alternative forum provided by law in which they should have sought redress. According to the respondents, such a forum exists under section 77 of the County Government Act.

46. The said section provides that:

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 by 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.*

47. The petitioners concede that the above section provides for a person dissatisfied with decisions of the County Public Service Boards to appeal to the Public Service Commission. They submit, however, that the section is not couched in mandatory terms, and that it gives any person the discretion to apply to the Public Service Commission. The question is whether it can properly be argued that the section was intended to establish a dispute resolution mechanism which parties may opt to use whenever they wish.

48. The application of this section has been the subject of consideration in three recent decisions of the High Court. In the case of **Nakuru County Human Rights Network (NAHURINET) vs Nakuru County Government and Another, Nakuru High Court Petition No 30 of 2014**, the petitioners challenged the constitutionality of the intended appointments to the position of Chief Executive Officer for Health Services by the Nakuru County Government. When the question of the applicability of section 77 was raised, the petitioner argued, as in the present case, that the operative word in section 77 is ‘may,’ which is not mandatory in nature. In rejecting that argument, the Court observed that:

“[19] Section 77(2) of the County Governments Act envisages a situation whereby the first port of call for any aggrieved person would be to raise an objection at every given stage provided, to the County Service Board against any decision arrived at during the recruitment exercise.

[23] This court reiterates that it is evident that the Applicant has not followed the set down process for redress as provided by the law and it is also evident that the recruitment exercise is still on-going and that the Applicant’s right to publicly participate in the recruitment exercise is found to be still intact. “

49. The Court cited the principle that where a process is established for the resolution of disputes, that process must be followed:

“[24] There is a lot of case law on due process and this court is guided by the Court of Appeal case of Speaker of The National Assembly v. The Hon. James Njenga Karume C.App. No. NAI. 92 of 1992 where Kwach, Cockar and Muli JJ.A stated;

‘...that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.....’”

50. In the case of **James Akelerio Muguu (Supra)**, when dealing with the same question, the Court observed as follows:

“[25] The Petitioners appear not to have voiced any objections at any of the aforementioned stages as against the nominated candidates to the Board or to the County Assembly.

[26] Nevertheless, all was not lost as the provisions of Section 77(2) of the County Governments Act allows any person dissatisfied or affected by any decision relating to employment of persons including a decision in respect of recruitment, selection, appointment to any office made by the County Public Service Board to appeal to the Public Service Commission against such decision.

[27] The operative words in the above section are ‘...shall entertain appeals...’ The Petitioners in their application and submissions have not demonstrated to this court that they had appealed against the decision of the Board to the Public Service Commission...

[29] The first port of call before coming to the High Court to seek redress would have been the Public Service Commission. It is apparent that the Petitioners did not follow the due process provided by law.

[30] The Petitioners have also not cited or invoked any provisions in the Constitution or any other written law that allows the circumvention of the due process provided by law to address such grievances.”

51. In the case of **Andrew Shiroko Shilenje vs County Government of Kakamega and Another, Kakamega High Court Petition No 22 of 2014**, the petitioner had challenged the constitutionality of the acts of the County Government of Kakamega which he claimed to have denied him the undisputed opportunity of becoming the Ward Administrator for Ingotse- Ematiha Ward within Kakamega County. It was not disputed that he had emerged first in the interview conducted by the respondent. Subsequently, he saw a re-advertisement of the position that he had applied for and been interviewed. The respondents challenged the jurisdiction of the Court in hearing the matter citing the provisions of Section 77 of the County Government Act. The Learned Judge rejected the argument that this section applied on the basis that the dispute in question primarily revolved around the alleged violation of the petitioner’s constitutional right under Article 47 among others. The Court addressed the issue as follows:

[20]... 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.

.....

(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.

.....

[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.”

52. The decisions set out above, being from courts of concurrent jurisdiction, are persuasive authority. I am inclined to agree with the reasoning of the Court in **Nakuru County Human Rights and James Akelerio Muguu (supra)**, and to take the view that the petitioners were obliged to approach the Public Service Commission if dissatisfied with the decision of the respondents. The petitioners were dissatisfied with the decision of the respondents with regard to recruitment to various positions within the county and they cannot argue, in the face of the clear provisions of section 77 of the County Government Act, that they can bypass the legislation and come to this Court by

way of a constitutional provision.

53. Aside from the views expressed in the two decisions set out above, I take this view for two additional reasons. First, it is my view that the legislature could not have intended to establish a dispute resolution mechanism, and then render it redundant immediately by giving parties the option to choose whether to follow it or not. Read as a whole, the provisions of section 77 of the County Governments Act evince an intention to have all disputes arising out of appointments by County Service Boards dealt with by the Public Service Commission, hence its grant to the Commission of the mandate in mandatory terms by providing that the Commission “...**shall entertain appeals in respect of recruitments, selection, appointment and qualifications attached to any office**”. There is no option given to a party to choose whether or not to file grievances with the Commission.

54. Secondly, as observed earlier in this judgment, the petitioners are not dissatisfied with the process followed in the recruitment of personnel for the county. Their grievance relates to the merits of the decisions made, and the determination of who was suitable for recruitment or not. While couched as a constitutional petition for vindication of alleged violation of rights, this petition calls for an inquiry into the merits of the decision of the respondents, an examination of the facts, the qualifications of the persons recruited, their ethnicity and, if found to be an appropriate criteria, their clan origins. This can properly only be done by a body hearing the appeal from the decisions made, and in my view, the body best placed to make such enquiries is the Public Service Commission. It is for this reason, I believe, that the legislature placed appeals and disputes with respect to appointments in counties with the Public Service Commission.

55. In the circumstances, I find that the issues raised in the present petition should have been raised before the Public Service Commission, which has the statutory mandate under section 77 of the County Governments Act to deal with such disputes.

56. The petition must therefore fail, and is hereby dismissed, but with no order as to costs.

Dated, Delivered and Signed at Nairobi this 17th day of September 2015

MUMBI NGUGI

JUDGE

Ms. Muhanda & Mr. Otieno instructed by the firm of Mudeshi Muhanda & Co. Advocates for the petitioners.

Ms. Mungai instructed by the firm of Letangule & Co. Advocates for 1st the respondent.

Mr. Sankale instructed by the firm of Tobiko, Njoroge & Co. Advocates for the 2nd respondent.

Mr Okoth instructed by the firm of Prof. Tom Ojienda & Associates Advocates for the interested parties.