



**Senema v Kisii County Public Service Board & 3 others (Petition E005 of 2023) [2024] KEHC 4890 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4890 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
PETITION E005 OF 2023**

**TA ODERA, J**

**MAY 8, 2024**

**BETWEEN**

**DAVID MANGONDI SENEMA ..... PETITIONER**

**AND**

**KISII COUNTY PUBLIC SERVICE BOARD ..... 1<sup>ST</sup> RESPONDENT**

**THE INSTITUTE OF HUMAN RESOURCE MANAGEMENT .... 2<sup>ND</sup>  
RESPONDENT**

**THE GOVERNOR KISII COUNTY (HON PAUL SIMBA  
ARATI) ..... 3<sup>RD</sup> RESPONDENT**

**THE KISII COUNTY ASSEMBLY ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner filed a constitutional Petition on 6<sup>th</sup> April, 2023 in public interest challenging an alleged decision by the Governor Kisii County (Hon. Paul Simba Arati, the 3<sup>rd</sup> Respondent to contract the 1<sup>st</sup> Respondent to conduct a staff audit of all persons employed by the 2<sup>nd</sup> Respondent. He claimed that the 1<sup>st</sup> Respondent has without seeking the written permission of the 2<sup>nd</sup> Respondent in violation of section 86 of the County Government Act gave some employees within Kisii county unofficial leave days of absence from their work places to attend an exercise it arranged with the 3<sup>rd</sup> Respondent at Kisii Stadium duped head count for a couple of days. He claimed was registered in the name of Gusii County counsel and the same was reserved for cattle tripping. They claimed too that that the 3<sup>rd</sup> Respondent by so doing was forcibly taking over the roles of the 2<sup>nd</sup> Respondent set out under section 59 of the *County Government Act*. They claimed that the 1<sup>st</sup> and 3<sup>rd</sup> Respondent were thus in flagrant violation of the *Constitution* and statute.



2. The Petitioner decried that the Authority exercised by the 1<sup>st</sup> Respondent at the instance of the 3<sup>rd</sup> Respondent without the express or written authority of the 2<sup>nd</sup> Respondent infringed the statutory functions of the 2<sup>nd</sup> Respondent and by extension an infringement of Article 2(2) of the Constitution and 2010; that the actions of the 1<sup>st</sup> Respondent and 3<sup>rd</sup> Respondent violated the provisions of Article 10 (1) of the Constitution of Kenya on the national values and principles; the Actions of the 1<sup>st</sup> and 3<sup>rd</sup> Respondent infringed the provisions of article 189 (1) and 249 (2) (a)-(b) that directs all levels of government be they national or county government to respect the authority of independent institutions such as the 2<sup>nd</sup> Respondent; that the 3<sup>rd</sup> Respondent infringed the article 201(c) by expending monies from the public coffers to fund actions that were unconstitutional. In the totality 1<sup>st</sup> Respondent breached articles 2(2), 10 (1), 189 (1), 201 and 249 (2) (a)-(b) of the Constitution by overstepping their respective constitutional and respective statutory mandate and deliberately and illegally assuming the statutory functions of the 2<sup>nd</sup> Respondent.
3. The Petitioner thus prayed that this court;
  - a. Declares that the 1<sup>st</sup> Respondent's statutory functions as set out in Section 6 of the Human Resource Management Professionals Act, 2012 are clear and the same do not involve taking up the functions of the 2<sup>nd</sup> Respondent that are well spelt out in the County Government Act, 2012.
  - b. Declares that by conducting a staff audit and headcount of the workers in the employment of the 2<sup>nd</sup> Respondent without the express and written permission of the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent acted *ultra vires* and in breach of their own statutory mandate under their constituting act and infringed on the statutory and constitutional functions of the 2<sup>nd</sup> Respondent. Consequently, all processes undertaken by the 1<sup>st</sup> Respondent and all reports produced by the 1<sup>st</sup> Respondent whilst conducting a staff audit and headcount of the workers in the employment of the 2<sup>nd</sup> Respondent and without the express and written permission of the 2<sup>nd</sup> Respondent are null and void.
  - c. Declares that the actions and decision of the 3<sup>rd</sup> Respondent of contracting and inviting the 1<sup>st</sup> Respondent to undertake and perform the statutory functions of the 2<sup>nd</sup> Respondent of conducting a staff audit and headcount of the workers in the employment of the 2<sup>nd</sup> Respondent without the express and written permission of the 2<sup>nd</sup> Respondent were ultra-vires hence null and void.
  - d. Declare that the 3<sup>rd</sup> Respondent has breached the provisions of articles 2(2), 3(1)10(1) C, 23(3).165(3) d(ii-iii), 189,201(d) and 249(2) a-b of the Constitution and sections 30,59 59A and 86 of the County Government Act.
  - e. Issues a permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents from receiving, discussing, adopting or in any way undertaking any activity, function, hearing or process anchored on placing reliance on any report, document, letter, circular or generally findings of the 1<sup>st</sup> Respondent emanating from their execution of the contract and/or invitation by the 3<sup>rd</sup> Respondent to undertake and perform the statutory functions of the 2<sup>nd</sup> Respondent of conducting a staff audit an headcount of the workers in the employment of the 2<sup>nd</sup> Respondent without out thee express and written permission of the 2<sup>nd</sup> Respondent.
  - f. Declares that all monies of the County Government of Kisii expended by the 1<sup>st</sup> Respondent in execution of their contract and/or invitation by the 3<sup>rd</sup> Respondent to undertake and perform the statutory functions of the 2<sup>nd</sup> Respondent of conducting a staff audit and headcount of the workers in the employment of the 2<sup>nd</sup> Respondent without the express and written permission



of the 2<sup>nd</sup> Respondent were spent contrary to the principle of prudent and responsible use of public funds espoused at article 201 ( d) of the *Constitution* and an order do issue compelling the 1<sup>st</sup> and 3<sup>rd</sup> Respondents jointly and severally to compensate by way of refund of all such monies to the public coffers of the Kisii County Government within 30 days from the date of the court's judgment.

- g. Grants the Petitioner costs of pursuit of this Petition together with interest to be paid by the 1st and 3rd Respondents and to be clear that such costs as shall be payable by the 3rd Respondent will be borne by him in person on account of having acted outside his official delineated powers and functions.
4. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent entered appearance on 12<sup>th</sup> April, 2023 through the county filed a preliminary dated 14<sup>th</sup> April, 2023 which is the subject of this ruling.
5. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent in his preliminary was based on ground that the Petition herein is not pleaded with precision as required of Constitutional Petitions in that: -

The Petition has not set out with adequate precision the Petitioner's complaint, the provisions of the *Constitution* infringed and the manner in which they are alleged to be infringed as held in the case of *Annarita Karimi Njeru v Republic* (1979) eKLR.

The Petition and the Application do not provide for adequate particulars of claim relating to the alleged violations of the *Constitution* of Kenya and the *County Governments Act*, 2012 as set out in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance v 5 Others* (2013) eKLR relating to the principle as set out in the *Annarita case* (*supra*).

The Petition and the Application do not state in a clear, concise and precise manner the correlation between the alleged infringements and the actions of the Respondents (if any) as set out in the case of *Manase Guyo & 260 others v Kenya First Services* (2016) eKLR.

The Petition is premised on alleged breach of statute without demonstrating how such alleged breach infringes on the bill of rights and/ or constitutional breach and thus wrongly brought as a Constitutional Petition as set out in the case of *Godfrey Paul Okutoyi & others v Habil Okaka & Another* (2018) eKLR.

6. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent thus urged this court to make a finding that the Petition herein do not meet the threshold for a Constitutional Petition and strike out the same with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
7. This court directed that the preliminary objection be conversed by way of written submissions. The Petitioner filed his submissions on 6<sup>th</sup> November, 2023., The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent filed their submissions on 20<sup>th</sup> July, 2023 while 4<sup>th</sup> Respondent filed theirs on 1<sup>st</sup> November, 2023.

#### **The Petitioners Submissions.**

8. The learned counsel for the Petitioner submitted on two main issues which are whether the preliminary objection is tenable in law and whether the Petition herein was pleaded with sufficient precision to warrant this court to hear and determine it.
9. On whether the Preliminary objection is tenable in law, the learned counsel submitted that, the preliminary objection filed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent was a pure point of law and thus the same ought not to be entertained by this court. The learned counsel contended that the pronouncement in the Anarita Karimi case and Mumo Matemu case that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent had based the



preliminary objection on were pronouncements that the court made after hearing the matters in the said case fully and on merit. The learned counsel further submitted that the question as to whether the Petitioner had sufficiently and with precision pleaded is one that cannot form the subject of a preliminary objection. He contended that such question will be one that will require a request of further particulars.

10. On the second issue as to whether Petition has been pleaded with precision to warrant this court to entertain it, the learned counsel submitted that the Petition had with precision outlined all the articles of the Constitution that had been infringed and that if the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent required any further clarification of any particulars therein, they should procedurally proper request in due time. The learned counsel reiterated that question of pleading and particularization is purely a point of fact and interpretation. 7. The learned counsel called to his aid the decision of the court of Appeal the case of *Co-operative Merchant Bank Ltd vs George Fredrick Wekesa* Civil Appeal No. 54 of 1999 where it was observed as follows;

“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases ... Whether or not a case is plain is a matter of fact...”

11. The learned counsel equally place reliance in the case of case of *Yaya Towers limited vs Trade Bank Ltd (in liquidation)* Civil Appeal No. 35 of 2000.

#### **The 2<sup>nd</sup> And 3<sup>rd</sup> Respondent’s Submissions**

12. The learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent submitted the Preliminary objection was one based on a pure point of law. The learned counsel submitted that the constitutional Petition is a shell that falls short of the threshold of a constitutional Petition. He contended that other than enumerating the Articles of the Constitution, there is nothing in the Petition to show with reasonable preciseness how the Petitioners constitutional rights have been infringed as a result of the actions of the 1<sup>st</sup> and the 3<sup>rd</sup> Respondent. the Learned counsel referred this court to the case of *Kenya Communication Commission of Kenya & 5 others vs Royal Media Services Limited and & 5 others* (2014) eKLR where the supreme court observed as follows;

“Although article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru vs Republic* [1979] KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.”

#### **The 4<sup>th</sup> Respondent Submissions.**

13. The learned counsel for the 4<sup>th</sup> Respondent reiterated the submissions of the 2<sup>nd</sup> and 4<sup>th</sup> respondent that the Petition did not meet the threshold of a constitutional Petition as was set out in the Anarita Karim case. the learned counsel equally submitted that the issues raised in the Petition were issues that should have been addressed through a judicial review process rather than a constitutional Petition filed by the Petitioner herein.



## Analysis and Determination

14. I have carefully considered the preliminary objection, as well as the written submissions filed by Petitioners, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent and have come to a conclusion that the main issues of determination are:
- a. Whether, the preliminary objection is properly before the court and if yes;
  - b. Whether this court has Jurisdiction to determine the suit and;
  - c. Whether the suit should have struck out.

## Whether, the Preliminary Objection is Properly Before the Court

15. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

.... A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

16. A constitutional question is an issue whose resolution would require the interpretation of the Constitution. According to the respondents, the Petition does not meet a threshold of a constitutional Petition and thus this court has no Jurisdiction to entertain it. Given that the Jurisdiction of this court has been questioned by the Respondents and bearing in mind that the issue of jurisdiction is a pure point of law, I hold that this Preliminary objection is properly before this court.

## Whether the Petition Meets the Required Threshold

17. The principles in dealing with Constitutional Petitions are set out in the case of *Anarita Karimi Njeri v. The Republic* [1976 – 1980] KLR 1272 which require a Petitioner to:
- i) Specifically set out the provisions in the Constitution that have been allegedly violated;
  - ii) Provide particulars of such violations;
  - iii) Provide particulars in which the Respondent has purportedly infringed their rights.
18. This principle was restated by the Court of Appeal in the case of *Mumo Matemo v Trusted Society of Human Rights Alliance* [2013] eKLR the court stated thus: -

“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 times 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 hand maiden 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 extract of this principle.”

19. In revisiting the above principles Lenaola, J. in *Stephen Nyarangi Onsoma & Ano. v. George Magoha & 7 Others* [2014] eKLR Stated:

“.....This Court has in the past expressed its concern about the manner in which parties coming before the Court and alleging a violation to Constitutional Rights have presented their cases. As a basic minimum a Petitioner is required to cite the provisions of the Constitution which have allegedly been violated and the remedy which he seeks, for the violation. In demonstrating the manner in which they have been violated, a Petitioner should present before the Court evidence of the factual basis upon which the Court can make a determination whether or not there has been a violation.”

20. In this instant Petition, it has been argued that the 1<sup>st</sup> and 3<sup>rd</sup> Respondent breached the provisions of articles 2(2), 3(1) 10(1) C, 23(3) 165(3) d(ii-iii), 189, 201(d) and 249(2) a-b of the Constitution and sections 30,59 59A and 86 of the County Government Act by taking over the functions of the 2<sup>nd</sup> Respondent, by directly inviting and contracting the 1<sup>st</sup> Respondent without the express permission of the 2<sup>nd</sup> Respondent to carry out a head count of employees of the county government of Kisii.

21. The Petitioner claims that he had received information that 3<sup>rd</sup> Respondent had contracted and invited the 1<sup>st</sup> Respondent to carry out staff headcount from reliable sources within the county government of Kisii which he sadly did not disclose without the express or written permission of the 2<sup>nd</sup> Respondent. However Petitioner did not concisely in his Petition state when the 3<sup>rd</sup> Respondent invited and contracted the 1<sup>st</sup> Respondent to the exclusion or with express or written permission of the 2<sup>nd</sup> Respondent or even present to this court the invitation letter or any correspondence written by the 3<sup>rd</sup> Respondent inviting or contracting it to carry out such activity without the permission of the 2<sup>nd</sup> Respondent or at best a copy of the contract of engagement between the 1<sup>st</sup> and 3<sup>rd</sup> Respondent to exclusion or without express or written permission of the 2<sup>nd</sup> Respondent. With such information the claim against the 3<sup>rd</sup> Respondent would have been precise and clear to warrant him respond to the allegations against him and for this court determine whether indeed the said actions took place and thus issue the orders prayed for therein such as declaring the decision as null void.

22. Upon review of the Affidavit in support of the Petition, I note that material evidence attached thereto to support the alleged violation of the listed of the Constitution and the statutory provisions are two letters from the Secretary of the 2<sup>nd</sup> Respondent inviting the concerned parties to the head count exercise by the 1<sup>st</sup> Respondent dated 11<sup>th</sup> and 25<sup>th</sup> November, 2022, a letter dated 11.11.22 from the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent as well attendance lists of county employees to be subjected to the headcount exercise. All the said annexures do not show the nexus between them and 3<sup>rd</sup> respondent or any engagement between the 1<sup>st</sup> Respondent and the 3<sup>rd</sup> Respondent to the exclusion of 2<sup>nd</sup> respondent. In essence there is no evidence of any form of engagement between the 1<sup>st</sup> Respondent and the 3<sup>rd</sup> Respondent to bring the dispute between the Petitioner, the 1<sup>st</sup> and 3<sup>rd</sup> Respondent to perspective and to enable them file a reply thereto. Surprisingly, the county Service board (2<sup>nd</sup> respondent) who is supposed to have been aggrieved has been sued as a respondent and not an interested party.

From the forgoing therefore I find that the Petition before me is short of a manifestation of contravention or infringement of the Articles that the Petitioner alleges to have been violated by the 1<sup>st</sup> and 3<sup>rd</sup> Respondent. The dispute presented before this court is a speculative one that is not based on a real dispute that the worth being entertained by this court. The Supreme Court in *Wanjiru Gikonyo*



¶ 2 others vs. National Assembly of Kenya & 4 others [2016] eKLR, stated that a court of law ought to limit itself to determination of cases that present an existing or live controversy or dispute and avoid cases that are speculative or academic. Without the Petitioner supplying the court with particulars of the decision he wants this to hold as having violated all the constitutional provisions enlisted on the face of the Petition concisely, on what basis does he expect this court want this court to proceed? This court cannot proceed to entertain a speculative account like this petition and grant its orders in vacuum. The Preliminary Objection by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent is upheld.

23. In any event, there is another crucial dimension which was not brought forth by the respondents herein and this court will deal with it *suo moto*. The petition on the face of it accuses the 3<sup>rd</sup> respondent of usurping the functions of the 2<sup>nd</sup> respondent i.e. is the county service board. The functions of the Public Service Board are enumerated in Section 59 (1) of the County Governments Act which provides -

59. Functions and powers of a County Public Service Board

- (1) The functions of the County Public Service Board shall be, on behalf of the county government, to—
  - (a) establish and abolish offices in the county public service;
  - (b) appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;
  - (c) exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part;
  - (d) prepare regular reports for submission to the county assembly on the execution of the functions of the Board;
  - (e) promote in the county public service the values and principles referred to in Articles 10 and 232;
  - (f) evaluate and report to the county assembly on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the county public service;
  - (g) facilitate the development of coherent, integrated human resource planning and budgeting for personnel emoluments in counties;
  - (h) advise the county government on human resource management and development;
  - (i) advise county government on implementation and monitoring of the national performance management system in counties;
  - (j) make recommendations to the Salaries and Remuneration Commission, on behalf of the county government, on the remuneration, pensions and gratuities for county public service employees.

It is clear that the functions of the public service board are mainly human resource related. The issues arising in this petition are touching on the functions of the County Public Service Board and are predominantly employment in nature. Article 162 (2) of the Constitution of Kenya provides that –

162. System of courts



- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
- (a) employment and labour relations; and Article 165 (5)
  - (b) provides - (5) The High Court shall not have jurisdiction in respect of matters — (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

24. From the foregoing, if this court were to hear this petition, then it would have to determine the rights of the county employees who were subjected to the alleged headcount and whether the same were violated by the actions of the respondents. Also whether the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents contravened the Constitution by usurping the functions of the County Service Board. It is my considered view that jurisdiction to deal with the functions of the service board and related matters is exclusively under the Employment and Labour Relations Court by dint of Article 162 of the Constitution.

25. This court thus has no jurisdiction to entertain this petition. The same is struck out.

26. Each party will bear its own costs.

It is so ordered.

**T.A. ODERA**

**JUDGE**

Presence of: -

Mr. Atiso Holding brief for Mr. Mogusu for the Petitioner

Miss Muma for Onserio for 4<sup>th</sup> Respondent

Mr. Mosota: 2<sup>nd</sup> and 3<sup>rd</sup> Respondent

