



**Omao v County Government of Nyamira & 4 others (Petition
E002 of 2023) [2023] KEHC 19032 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19032 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
PETITION E002 OF 2023
WA OKWANY, J
JUNE 15, 2023**

BETWEEN

VINCENT MARIITA OMAO PETITIONER

AND

COUNTY GOVERNMENT OF NYAMIRA 1ST RESPONDENT

GOVERNOR, NYAMIRA COUNTY 2ND RESPONDENT

COUNTY SECRETARY, NYAMIRA COUNTY 3RD RESPONDENT

**CHAIRPERSON, NYAMIRA COUNTY PUBLIC SERVICE BOARD 4TH
RESPONDENT**

**SECRETARY, NYAMIRA COUNTY PUBLIC SERVICE BOARD 5TH
RESPONDENT**

JUDGMENT

Introduction

1. The Petitioner herein, Vincent Mariita Omao, sued the Respondents through the petition dated 20th March 2023 seeking the following orders: -
 - a. A declaration that the Respondents have jointly and severally violated the Petitioner's fundamental rights and freedoms as protected under Articles 27, 28, 41, 47 and 55 of *the Constitution*.
 - b. A declaration that the Advertisement inviting applications without necessary budgetary approvals is unconstitutional and illegal and in violation of the *Public Finance Management Act*, 2012.



- c. An Order for cancellation of the advertisements as advertised in the County website dated 10th March, 2023 and the Daily Nation Newspaper of 9th March, 2023 within 14 days of issue of an order from this Honourable Court.
 - d. A declaration that the Respondents herein were obliged and/or enjoined to advertise all the vacancies and/or portfolios in the Nyamira County Government and thereby carry out and/or conduct a Transparent and/or Accountable recruitment, in compliance and/or accordance with Article 10 (1), (c) of *the Constitution* 2010.
 - e. An Order of judicial review of certiorari be issued to remove into the honourable court for quashing the decision of the Respondents to advertise non-vacant and non-existent positions and as conveyed the advertisements by the Respondents and without due regard to the provisions of the County Government Act, No. 17 of 2012, *Employment Act*, 2007 and Article 10 of *the Constitution*, 2010.
 - f. An Order declaring that the said decision of the Respondents prompting to advertise non-vacant and non-existent positions was illegal and irregular and the same be brought into the court and be quashed pursuant to an order of certiorari.
 - g. An order of permanent injunction be and is hereby issued restraining the Respondents either by themselves, agents, servants and/or employees from appointing, employing, recruiting and/or enlisting employees without complying with the due process of the law and in particular, the provisions of the County Government Act, 2012 and Article 10 (1) of *the Constitution* of Kenya, 2010.
 - h. A Permanent Injunction, restraining the Respondents either by themselves, agents, servants and/or employees, from admitting the subject Employees to the Payroll of the 1st Respondent and/or making any payments to and/or in favour of the said employees, either on account of Remuneration, Allowances and/or Salaries, without the necessary budgetary approval of the Nyamira County Government, whatsoever and/or howsoever.
 - i. A Permanent Injunction restraining the Respondents either by themselves, agents, servants and/or employees, from employing, recruiting and/or enlisting employees without complying with the due process of the law and in particular, the provisions of Article 10 (1) of *the Constitution*, 2010.
 - j. A declaration that the Petitioner be compensated the amount of money that the Court deems sufficient and/or appropriate by the Respondents for the violation of the Petitioner's rights and fundamental freedoms under Articles 27, 28, 41, 47 and 55 of *the Constitution*.
 - k. This Honourable Court do order that the costs of this Petition be borne by the Respondents.
 - l. Any other or further orders, writs and directions this court considers appropriate and just to grant for the purpose of the enforcement of the petitioner's fundamental rights and freedoms.
2. Concurrently with the petition, the Petitioner filed an application seeking, inter alia, an order of injunction to restrain the Respondents from recruiting any person to fill some 357 positions as advertised in the Daily Nation Newspaper of 9th March 2023 and posted on the 1st Respondent's website on 10th March 2023.
 3. The Respondents opposed the petition through a Notice of Preliminary Objection (PO) dated 29th March 2023 wherein they listed the following grounds: -



- i. That, this Honourable court lacks jurisdiction to hear and determine matters related to employment by dint of Article 162 (2) (a) as read with Articles 165 (5) (b) of the constitution of Kenya, 2010.
 - ii. That the issues raised in the application and the Petition can only be determined by the Employment and Labour Relations Court by dint of Section 12 of the Employment and Labour Relations Court Act.
 - iii. That the suit is incompetent, bad in law frivolous/vexatious, fatally defective and/or an abuse of the court process.
4. Parties canvassed the application by way of written submissions which I have considered. The gist of the Respondents' PO is that by dint of the provisions of Article 162 (2) of the Constitution and Section 12 of the Employment and Labour Relations Court Act, which spells out the nature of cases to be handled by the Employment and Labour Relations Court (ELRC), this court lacks the jurisdiction to hear and determine this case.
 5. The Respondents submitted that the said provisions assign and limit employment and labour relations disputes to the ELRC. According to the Respondents, the instant petition seeks to stop the Respondents from recruiting 327 workers which is a matter that can only be determined by the ELRC.
 6. The Petitioner on the other hand, submitted that the PO is not merited as there is no employer-employee relationship whatsoever between the Petitioner and the Respondents so as to warrant the filing of the petition before the ELRC. According to the Petitioner, one has to demonstrate the existence of employer-employee relationship in order to access the ELRC.
 7. As was held in the off-cited case of *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989) KLR 1, "jurisdiction is everything without which a court must down its tools".
 8. Section 12 of the Employment and Labour Relations Act (hereinafter "the Act") stipulates as follows concerning the disputes that shall be heard by the ELRC: -
 - 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 union's 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;
 - g. disputes between an employer's organization or a federation and a member thereof;
 - h. disputes concerning the registration and election of trade union officials; and
 - i. disputes relating to the registration and enforcement of collective agreements.
 9. My finding is that contrary to the Petitioner's argument that only disputes relating to employer and employee shall be heard by the ELRC, Section 12 of the Act outlines several categories of disputes that fall under the jurisdiction of the ELRC.



10. The present petition is not, strictly speaking, concerned with employer/employee relationship, but with advertisement and recruitment of employees which, in my considered view, is a step towards the creation of the said relationship (See *Nick Githinji Ndichu v Clerk Kiambu County Assembly & Another* [2014] eKLR.)
11. I find that this petition falls within the jurisdiction of the ELRC. I therefore find that the Preliminary Objection is merited.
12. Consequently, I direct that this matter be placed before the ELRC Court in Kisumu for hearing and determination.
13. The costs of the Preliminary Objection shall abide the outcome of the petition.
14. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 15TH DAY OF JUNE 2023.

W. A. OKWANY

JUDGE

