



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**PETITION NO. E001 OF 2020**

**IN THE MATTER OF**

**THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF**

**ARTICLES 2,3,10,27,73,159,165,226,232,235,236,258, AND 259 OF**

**THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF**

**THE ALLEGED CONTRAVENTION OF ARTICLES 10,226,232,235**

**AND 236 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF**

**THE COUNTY GOVERNMENTS ACT NO 17 OF 2012**

**AND**

**IN THE MATTER OF**

**THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT NO 1A OF 2015**

**AND**

**IN THE MATTER OF**

**THE SALARIES AND REMUNERATION COMMISSION ACT NO. 10 OF 2011**

**AND**

**IN THE MATTER OF**

**THE PUBLIC FINANCE MANAGEMENT ACT NO. 18 OF 2012**

**BETWEEN**

**LEONARD SIGEY ARAP BETT.....PETITIONER**

- VERSUS -

**THE GOVERNOR BOMET COUNTY.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF BOMET.....2<sup>ND</sup> RESPONDENT**

**BOMET COUNTY PUBLIC SERVICE BOARD....3<sup>RD</sup> RESPONDENT**

**AND**

**SALARIES AND REMUNERATION**

**COMMISSION .....INTERESTED PARTY**

**JUDGMENT**

1. The petitioner describes himself as a resident of Bomet County, a law-binding citizen and an Advocate of the High Court of Kenya with an unflinching resolve to respect, uphold and defend the Constitution of Kenya. He brings the petition pursuant to articles 258 of the constitution, which grants every person the right to institute court proceedings claiming that the constitution has been contravened or is threatened with contravention.

2. The facts of the case are that the respondents have unlawfully created offices in the County Public Service, and subsequently appointed persons to hold the said offices without reference to the establishment or advisory from the interested party (SRC). Further the respondents have appointed persons without any proper job descriptions to amorphous positions of Advisors, Special Advisor, Special Directions, Personal Assistants and other aides with vague designation, in the office of the 1<sup>st</sup> respondent (Governor), his deputy and County Secretary, positions that do not exist in the county organizational structure. The said positions have been created for political reasons and lack justification.

3. The respondents have irregularly and unnecessarily increased the number of the so-called partisan staff in open defiance to what SRC has authorised in its mandate under Article 230(4) of the Constitution. The creation of the impugned offices was done arbitrarily without any plan or budget. The said offices were not filled competitively, are ranked and remunerated highly compared to Chief Officers and County Executive Members and has conferred unfair benefit to the political appointees.

4. The respondents have caused and may continue to cause unnecessary and wasteful use of public expenditure since they continue to create more offices outside the approved establishments. In the petitioner's view, the respondents have exercised public power in a manner that undermines accountability, good governance, rule of law and constitutionalism.

5. The petition is anchored on Article 2(1), 3(1), 10, 201(d), 226(5), 230, 232(1), 235, 258 and 259(11) of the Constitution and it seeks the following reliefs:-

i. This Honourable Court be pleased to issue a declaration that any appointment of advisors/special advisors/directors in the office of the Governor personal assistants to the Governor, personal assistant to the Deputy governor, personal assistant to the County Secretary or other partisan staff known by other styles to any offices within the Bomet County Public Service that lacks legal authority for its establishment is invalid, illegal, null and void.

ii. The Honourable Court be pleased to issue a declaration that advisories by the Salaries and remuneration Commission capping the number of staff to be appointed as personal staff in the office of a county Governor, Deputy Governor and County Secretary is binding upon all state organs including the Respondents.

iii. This Honourable Court be pleased to issue an order declaring that the terms of office of advisors of the 2<sup>nd</sup> respondents be on part-time basis

iv. The court be pleased to issue a declaration that the 3<sup>rd</sup> Respondent by unlawfully and irregularly appointing person to act in offices that have not been authorized in the county staff establishment have improperly exercised their public power conferred on them and have thereby abused their office.

v. This court be pleased to issue a declaration that the Respondent have grossly violated the constitution.

vi. The Court be pleased to issue order that the members of the 3<sup>rd</sup> respondents be jointly and severally surcharged for public expenditure arising out of the irregular appointments of advisors/special advisors/directors in the office of the Governor personal assistants to the Governor, personal assistant to the Deputy Governor, personal assistant to the County secretary made by the 3<sup>rd</sup> Respondents.

vii. That in the alternative the Court do issue an Order that the Respondents do ensure that all monies irregularly and unlawfully spent on unauthorized advisors/special advisors/directors in the office of the Governor personal assistants to the Governor, personal assistant to the Deputy Governor, personal assistant to the County Secretary are recovered from the relevant persons.

viii. That costs be provide for

ix. Any other appropriate relief that the Court deems it.

6. The petition is supported by the Affidavit sworn by the petitioner on 30.9.2020, which reiterates the facts set out in the petition and it attaches four documents as evidence. The second respondent opposed the petition vide the Replying Affidavit sworn on 23/10/2020 by her County Secretary, Ms Stella Langat and by the Grounds of Opposition filed jointly with the first respondent on 5/10/2021.

7. In brief the first and second respondent's case is that the orders sought in the petition are not efficacious in the circumstances because the 3<sup>rd</sup> respondent has already taken corrective measures in regard to the impugned cadre of staff pursuant to sections 77 of the County Governments Acts; that the petition has failed to plead with reasonable precision against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent considering that their functions under section 30 and 44 of the Act do not include establishment and abolition of offices, appointments and revocation of appointments of County employees; that the petitioner has failed to tender adequate evidence to show at first instance that adverse employment decisions were made by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent; and that the order sought herein are actuated by malice, bad faith and through misrepresentation of facts to the court and meant to stifle the smooth running of the Bomet County public service.

8. The 1<sup>st</sup> and 2<sup>nd</sup> respondent further aver that the petition is premature since internal mechanism for the corrective measures from the 3<sup>rd</sup> respondent was not sought pursuant to section 59, 60 and 77 of the County Governments Act.

9. They further aver that, the petitioner has no justiciable labour dispute for determination before this court and as such the suit is hypothetical and abstract for want of a real dispute for determination. In particular, they aver that the petitioner has not specifically pleaded with reasonable precision the right or rights alleged to have violated by them, petitioner has not demonstrated what prejudice or inconveniences will be caused to him if the orders sought are denied and as such the petition is an abuse of the process of the court.

10. In the Replying affidavit, the County Secretary denied that the 2<sup>nd</sup> respondent has unlawfully expanded partisan staff of the county of Bomet to numbers that is disproportionate to the one authorised by the SRC. She contended that the Petitioner has made exaggerations and falsehood to mislead the court about the matter. She maintained that all advisory Staff in Bomet County are in office in accordance to the authorised staff establishment. She contended that the petitioner has produced no evidence to prove that there are 20 partisan staff in pay roll.

11. The affiant deposed that the 2<sup>nd</sup> respondent is a law-abiding organ and upholds all laws governing staff of public offices in the County and has always moved with alacrity in correcting oversight in staffing of public offices. She confirmed that she noted an anomaly in the recruitment of certain advisory staff in the office of the 1<sup>st</sup> Respondent and brought it to the attention of the 3<sup>rd</sup> respondent to take corrective measures under section 77 of the County Governments Act and the 3<sup>rd</sup> respondent has since corrected the oversight by revoking the concerned appointments. Finally, she opined that the accusation by the petitioner are generalised, imprecise, and lack particulars, and therefore they are incapable of direct rejoinder.

12. The 3<sup>rd</sup> respondent and the SRC did not participate in the petition after Wasilwa J rendered a ruling herein on 13/7/2021 whereby she gave conservatory orders barring the respondents from appointing any partisan staff other than those authorised by SRC.

## ARGUMENTS

13. Mr Musyoka Annan, learned counsel for the petitioner summed up the Petition as complaint against the irregular and unlawful appointments by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents of persons claiming to be advisory officers. He contended that the said appointments are contrary to the Constitution, County Government Act and Staff Establishment Manual (Circular by the SRC).

14. He contended that the respondents have breached Article 2(1), 3(1), 10, 12, 201, 226(5), 230, 232(1), 235, 258 and 259 (11) of the Constitution which dictates how public bodies ought to undertake recruitment of employees, including public participation through advertisement in mass media. He contended that the impugned appointments were done irregularly without advertisement in the mass media. He submitted that the irregular and unconstitutional appointments were done to reward political cronies.

15. He further submitted that the petitioner has proved his case through the petition and the supporting affidavit as opposed to the allegation made by the respondents in their grounds of opposition. He contended that before the court gave conservatory orders, it was satisfied that the petitioner had established a prima facie case. He further submitted that the respondents have indeed admitted the irregular recruitment complained of in the petition by stating that the oversight was rectified.

16. He also submitted that there is no merit in the respondents' objection that the petitioner lacks *locus standi* since he has no employment relationship with them. He contended that the petitioner's *locus standi* stems from his citizenship, which gives him the right to sue if the law is being breached and to protect public funds.

17. The counsel urged the court to arise, take the occasion and protect public funds and people from public bodies which violate the law by using public offices like private business. Finally he prayed for the petition to be allowed with costs.

18. Mr Matwere, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the petition. He submitted that the role of recruiting and appointing staff of the County Government is by the 3<sup>rd</sup> respondent pursuant to section 58 and 59 of the County Governments Act. He maintained that the only role played by his clients is to nominate but the recruitment and appointment is done by the 3<sup>rd</sup> respondent.

19. He contended that the County Secretary in her Replying Affidavit confirmed that the impugned recruitment was done by the

3<sup>rd</sup> respondent and when a complaint was raised, she notified the 3<sup>rd</sup> respondent to take the corrective measures under section 77 of the County governments Act. He submitted that by the time the petition was filed, the corrective measures had already been undertaken by revocation of the irregular appointment.

20. He reiterated that the petitioner has not pleaded with precision and tendered cogent evidence to prove the alleged violation. The counsel contended that the petitioner is only relying on information from social medial (blogger) who has not sworn any affidavit in this suit to verify the allegations made.

21. He contended further that the prayers sought are not merited since the corrective measure sought were made even before the petition was filed. Further, he submitted that the prayer for reimbursement of the salary paid to the staff recruited irregularly cannot be sought against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent because it was not their duty to recruit the said staff.

22. Further, he submitted that the petition should be dismissed with the costs because the suit was under the umbrella of public interest litigation.

23. In a brief rejoinder, Mr Musyoka Advocate submitted that Ms Stella Langat's appointment was declared null and void *ab initio* by Radido J in **Kisumu ELRC 14 of 2020** and as such her actions including the notice to the 3<sup>rd</sup> respondent to rectify the irregular appointments was also void. He further submitted that section 77 of the County Governments Act deals exclusively with an appeal and not what the respondents are calling corrective measures.

24. Finally, he also submitted that 1<sup>st</sup> respondent is the one who played the key role in the appointment of the persons under review. As regards the issue of costs, the counsel contended that the violation done by the respondents is enormous and therefore they ought to be condemned to pay costs as lesson to others.

### **Issues for determination and analysis**

25. I have considered the petition, grounds of opposition, affidavits and oral submissions by counsel. It is a fact that some staff of the 2<sup>nd</sup> respondent were irregularly appointed. It is also a fact that the County Secretary of the 2<sup>nd</sup> respondent received a complaint about the said irregular appointments and she wrote letter to the 3<sup>rd</sup> respondent asking it to take corrective measures. It is also a fact that the 3<sup>rd</sup> respondent corrected the oversight by revoking the irregular appointments.

26. The issues for determination are;

- a) Whether the petition meets the competence threshold.*
- b) Whether the respondents have violated the constitution.*
- c) Whether the reliefs sought are merited.*

### **Competence threshold**

27. It is now trite law that any suit grounded on violation or threatened violation of the constitution or infringement of a right or fundamental freedom in the Bill of Rights must meet certain competency threshold in the pleadings. The said competency threshold was enunciated by the High Court of Kenya in *Anarita Karimi Njeru –v-Republic [1979]eKLR* where it was held that:

*“We would, however, again stress that if a person is seeking redress from the high Court on a matter which involves a reference to the constitution, it is important (if to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provision said to be infringed, and the manner in which they are alleged to be infringed.”*

28. The Court of Appeal upheld the above decision in **Mumo Matemu –v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** allowed the appeal and dismissed the petition on ground of failure to plead the case with precision. The court held that:

*“(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims.*

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

29. In the instant petition, the petition has set out the particulars of violation and threats to the constitution in paragraph 21 to 27 of the petition

a) The impugned appointments by the respondents offends Article 235 of the Constitution read with section 60 and 62 of the County Governments Act that enjoins the county government to operate within a framework of uniform norms and standards for establishing and abolishing offices in its public service and appointing persons to hold or act in those offices.

b) By causing the appointment of political functionaries to offices that have not been planned or budgeted for, the respondents violated Article 232 of the Constitution on values and principles of public service that requires efficient, effective and economic use of resources.

c) By neglecting to respond to queries on the impugned recruitment by well-meaning citizen such as the petitioner, the 3<sup>rd</sup> respondent violated Article 232 (e) and (f) of the Constitution which enjoins state organs to be accountable for administrative acts and to ensure transparency and provision of timely, accurate information.

d) By wilfully disregarding advice of the SRC, the respondents violated the principles of the rule of law and good governance which are values articulated in Article 10(2) of the Constitution.

e) By presiding and managing the impugned appointments in favour of political allies, without planning and budget, respondents violated Article 235 of the Constitution aforesaid.

f) By openly defying and countermanding advisories of the SRC on the requisite number of partisan staff to be employed in the county, the 3<sup>rd</sup> respondent and its members have abused their public power contrary to the intentions of Article 73 of the Constitution.

g) By treating advice by SRC as mere recommendations which are not binding on them, the respondents violated Article 230 of the Constitution.

30. According to the 1<sup>st</sup> and 2<sup>nd</sup> respondent, the petitioner has not pleaded his case with precision to warrant direct rejoinder but has only made generalised allegations. I agree with the respondents to some extent especially because no particulars have been given of any irregularly appointed staff who are still on the 2<sup>nd</sup> respondent's pay roll. However, considering the particulars set out above, I find and hold that the petitioner has pleaded his case with some degree of precision that can enable the court to inquire into the merits of the allegations pleaded.

31. While appreciating the precedents cited above on the competency threshold, I am of the considered opinion that when faced with a matter like this, where public interest is at the centre, a Court of law should endeavour more to sustain the suit rather terminate it and banish the petitioner from the seat of justice.

#### **Whether the respondents have violated the Constitution.**

32. I have already made a finding of fact that some staff of the 2<sup>nd</sup> respondent were irregularly recruited and appointed by the 3<sup>rd</sup> respondent. I have also made a finding of fact that the County Secretary of the 2<sup>nd</sup> respondent wrote to the 3<sup>rd</sup> respondent to take corrective measures and the same was done. The foregoing facts emerge clearly from the Replying Affidavit sworn by the County Secretary and the Chairman of the 3<sup>rd</sup> respondent sworn on 20.10.2021 in reply to an earlier application.

33. According to the petitioner's counsel, the respondents have admitted that they made irregular appointments and therefore the alleged violation of the Constitution. I agree with the petitioner that the violation was admitted. However, the blame lies with the person who has the legal mandate to recruit and appoint employee to the county public service. That person is none other than the 3<sup>rd</sup> respondent.

34. The violation done was in respect of five appointments done on 4.5.2020 and it is captured in the revocation letters written to the appointees on 30.6.2020. The appointments of Bishop Eunice Benson (Advisor – Gender Affairs) and Dr. Richard Rono (Director – Information and e-Governance) were revoked because 'the office has not been established in accordance with the law'. The appointment of Sitinei Kibet (Chief Administrative Officer -office of the Governor), Jacob Rotich (Director- Communications and Events) and Anderson Kirui (Director – Executive Affairs) were revoked because 'the office is in the public service which could only be filled competitively and transparently in accordance with the prescribed appointment or promotion procedures and that direct appointments to the said office is improper.'

35. The respondents admit that the said irregular appointments were contrary to the law because the first two offices had not been established in accordance with the law while the other three had been filled through direct appointment as opposed to competitive and open manner. The said appointments violated the principles of rule of law and good governance articulated in Article 10 of the Constitution. They also violated the values and principles of public service articulated in Article 232 of the Constitution. Also the said appointments violated Article 235 of the Constitution by appointing officer to offices which were not lawfully established and by appointing others to public offices directly instead of using competitive recruitment. Finally, the said appointments amounted to abuse of the public power contrary to Article 73 of the constitution.

#### **Reliefs**

36. In view of the foregoing finding that the impugned appointments were irregular and in violation of the Constitution, I find that some of the reliefs sought are merited. Consequently I make declaration in terms of prayer i, ii, and iv in the petition.

37. However, I decline to make declaration in terms prayer iii because no proper basis has been laid before the court for the same. I also

believe that it is not within the jurisdiction of the court to set the terms of service for the staff of the 2<sup>nd</sup> respondent. There are public bodies established by the law to do that.

38. I also decline to make declaration that all the respondents have grossly violated the Constitution because as already observed above, only the 3<sup>rd</sup> respondent can be blamed for the said irregular appointments

39. I further decline to order for surcharge or reimbursement of the public funds to the irregular appointees because it has not been shown that the 3<sup>rd</sup> respondent deliberately defied the law. As already observed above, the respondents took corrective measures in accordance with the law even before this suit was filed.

40. The respondents proved by evidence that the oversight was corrected on 30.6.2020. The petitioner contends that the appointment of the County Secretary was declared null and void by the court and as such the alleged measures taken was also void. In my view it was immaterial whether the notice of the irregularity to the 3<sup>rd</sup> respondent came from County Secretary or not.

41. The revocation was done under section 75 of the County Governments Act which provides that:

***“if it comes to the attention of the County Public Service Board that there is a reason to believe that any process or decision under this part may have occurred in an irregular or fraudulent manner, the County Public Service Board shall investigate the matter and, if satisfied that the irregularity or fraud has occurred, the County Public Service Board may –***

***(a) Revoke the decision;***

***(b) ...”***

42. The revocation ended the said irregular appointments as the petitioner has not tabled any evidence to the contrary. He has also not tabled any evidence that other irregularly appointed staff are still in the 2<sup>nd</sup> respondent’s payroll. Consequently, I agree with the respondents that the said irregular appointments were revoked as required by the law months before the petitioner brought this suit.

43. Finally, the petitioner prayed for respondents to be condemned to him costs of the petition. However, I agree with the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the suit is in the nature of public litigation case and that the suit was brought after the rectification of the impugned irregularity. Consequently, I direct that each party shall bear own costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 18TH DAY NOVEMBER, 2021.**

**ONESMUS N MAKAU**

**JUDGE**

**ORDER**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**