



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**PETITION NO. E002 OF 2021**

IN THE MATTER OF ARTICLES 2, 10, 35, 47, 165, 174, 185, 190,  
201, 228, 232 AND 258 OF THE CONSTITUTION OF KENYA

-AND-

IN THE MATTER OF SECTIONS 7, 8, 51, 57, 60, 93, 95 AND 96  
OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

-AND-

IN THE MATTER OF SECTIONS 36, 102 AND 107 OF THE  
PUBLIC FINANCE MANAGEMENT ACT, 2012

-AND-

IN THE MATTER OF REGULATIONS 25 OF THE PUBLIC FINANCE MANAGEMENT  
(COUNTY GOVERNMENTS) REGULATIONS, 2015

-AND-

IN THE MATTER OF THE ADVERTISED 621 JOB VACANCIES IN THE COUNTY  
GOVERNMENT OF NYANDARUA IN CONTRAVENTION OF ARTICLES 2,  
10, 35, 47, 174, 175, 190, 201 AND 232 OF THE CONSTITUTION OF KENYA

-AND-

IN THE MATTER OF CONTRAVENTION OF THE FISCAL RESPONSIBILITY PRINCIPLES

-BETWEEN-

**PETER MACITHI MUIGAI.....PETITIONER/APPLICANT**

-AND-

THE COUNTY PUBLIC SERVICE BOARD, NYANDARUA COUNTY.....1<sup>ST</sup> RESPONDENT

THE NYANDARUA COUNTY GOVERNMENT.....2<sup>ND</sup> RESPONDENT

NYANDARUA COUNTY ASSEMBLY.....3<sup>RD</sup> RESPONDENT

### RULING

1. By Petition dated 20/01/2021 the petitioner seeks the reliefs;

*I. A declaration that the 2<sup>nd</sup> Respondent has violated the Constitution of Kenya in its budgetary expenditure for the financial year 2019/2020 against the legitimate expectation of the Nyandarua County taxpayer that the County's budgetary resources allocation shall be applied in compliance with the Fiscal Responsibility Principles.*

*II. A declaration that the 1<sup>st</sup> Respondent intended recruitment of 621 job vacancies violates the Constitution of Kenya and the Fiscal Responsibility Principles.*

*III. An order prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from proceeding with the intended recruitment of 621 job vacancies prior to carrying out a staffing audit of all the current employees at the 2<sup>nd</sup> Respondent to establish an optimal staffing structure in order to ensure a sustainable wage bill at the 2<sup>nd</sup> Respondent.*

*IV. An order directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to carry out a staffing audit of all the current employees at the 2<sup>nd</sup> Respondent to establish an optimal staffing structure in order to ensure a sustainable wage bill at the 2<sup>nd</sup> Respondent.*

*V. An order directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to supply the Petitioner with the said staff audit and/or publish the same in the leading daily newspaper of wide circulation in Kenya for the benefit of the general public.*

*VI. An order for cost of the Petition.*

*VII. Such other orders as this court may deem fit to grant.*

2. Contemporaneous with the Petition the Petitioner lodged a notice of motion dated on even date seeking orders;

*a. Spent.*

*b. Spent.*

*c. THAT pending the hearing and determination of this Petition and thereafter as the court shall order, this Court be pleased to issue a temporary conservatory order prohibiting the 1<sup>st</sup> Respondent or anybody acting under them from proceeding with the recruitment exercise of the purported 621 vacant positions at the 2<sup>nd</sup> Respondent.*

*d. Costs of this application to abide the outcome of the Petition.*

3. The notice of motion is supported by the grounds in the motion namely;

*a. In exercise of its function and powers provided for under Section 59 of the County Government Act, 2012, the 1<sup>st</sup> Respondent placed an advert in the Daily Nation Newspaper and on all the*

websites and social media pages associated with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents inviting interested members of the public to make applications to participate in an intended recruitment exercise in respect of purported 621 vacant positions of employment at the 2<sup>nd</sup> Respondent.

**b.** The interested candidates were required to make their respective applications and submit the same on or before 21/10/2020 to the 1<sup>st</sup> Respondent whereupon, shortlisting and interviews exercises would follow.

**c.** The Petitioner has, consequently, filed the instant petition which is, seemingly, anchored on weighty constitutional, statutory and subsidiary legislation provisions challenging the constitutionality of the impugned recruitment exercise which he contends to be clearly unprioritized, non-cost-effective, unsustainable and in all respect contravening the constitutional requirements on prudent and responsible using of public finances by the Respondents pursuant to the clear provisions of **Article 201 (d) of the Constitution of Kenya** and the **Fiscal Responsibility Principles**.

**d.** The impugned recruitment exercise was commenced by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and, obviously, approved by the 3<sup>rd</sup> Respondent, who is constitutionally required to provide checks and balances to the 2<sup>nd</sup> Respondent, in the face of the recommendations by the Controller of Budget to the 2<sup>nd</sup> Respondent in her Budget Implementation Review Report dated May, 2020 in respect of the first nine months of financial year 2019/2020 to all county governments in Kenya wherein; the Controller of Budget opined to the 1<sup>st</sup> Respondent to establish an optimal staffing structure in order to ensure a sustainable wage bill at the 2<sup>nd</sup> Respondent.

**e.** The recommendations by the Controller of Budget are justified in view of the fact that the total expenditure on wages, emoluments, compensation and salaries for public officers at the 2<sup>nd</sup> Respondent for the financial year 2019/2020 stood at **32.2%** while the total expenditure on development stood at **28.8%** way below the constitutionally required **30%** and, therefore, blatantly contravening the **Fiscal Responsibility Principles** under **Article 201 of the Constitution of Kenya** as read together with the clear provisions of **Section 107 of the Public Finance Management Act, 2011** which principle mandates the 2<sup>nd</sup> Respondent to pursue the appropriate level of expenditure to maintain a sustainable public finance and ensure fiscal policy that aids in optimum rate of economic growth and social development.

**f.** The intended recruitment shall increase upwards the 2<sup>nd</sup> Respondent's wage bill by a further approximated sums of **Kshs.700million** annually and, consequently, adversely affecting the constitutionally, budgetary ceiling allocation for development expenditure for the financial year 2020/2021 against the legitimate expectation of the Nyandarua County taxpayer that the County's budgetary resources allocation shall be applied for development projects towards improving their livelihood and wellbeing in compliance with the **Fiscal Responsibility Principles**.

**g.** In the 2<sup>nd</sup> Respondents Itemised Budget Estimates for the Financial Year 2020/2021 which was duly approved by the 3<sup>rd</sup> Respondent, no budgetary allocation was made to cater for the impugned mass recruitment of staff and, equally, the 2<sup>nd</sup> Respondent has not made efforts to explain where it intends to source for monies (approximated at **Kshs.700million** annually) to cater for the wages, emoluments, compensation and salaries of the said staff.

**h.** The intended recruitment exercise is, equally, being undertaken in the wake of National Government policy statement contained in a circular dated 28/08/2019 by the National Treasury to all the accounting officers in government ministries, state departments including parastatals, and agencies (MDAs) and copied to all the County Governments' Executive Members for Finance advising them not to allocate resources for new recruitments and to freeze all the unnecessary expenditure on staff emoluments.

*i. A look at the purported advertised positions equally informs that the intended recruitment is likely to cause wasteful expenditure of the limited budgetary allocation for resources due to inter-alia; duplication of functions/roles, ghost workers, non-essential staff e.t.c. For example, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are seeking to recruit in the impugned recruitment exercise, **ten (10) Ward Administrators (Job Group J)** whereas, only one (1) vacancy exists out of the 25 established wards in the Nyandarua County.*

*j. The Petitioner's instant Petition therefore seeks to nullify the impugned recruitment exercise for being unconstitutional and, therefore, if the said exercise is allowed to proceed unabated, the Respondents shall proceed with the said illegal action and in the results blatantly violating the Constitution of Kenya beyond any recall.*

*k. Further, unless the Respondents are stopped by an order of this Court from proceeding with the intended recruitment exercise, the Petitioner's instant Petition shall be rendered nugatory.*

4. The applicant also filed an affidavit to support the application which he swore on 20/01/2021 which reiterates the same grounds stated above.

5. 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed affidavits in reply to the notice of motion sworn on 05/02/2021 by John Mwangi Maina member of 1<sup>st</sup> Respondent and Teresia K. Njeru Deputy H.R. of County Government of Nyandarua. The parties were directed to canvass application via submissions of which they filed and exchanged. For Respondents, 2<sup>nd</sup> Respondents filed submissions and the Applicant also did file.

#### **APPLICANT'S SUBMISSIONS**

6. Firstly, at the heart of the Petition is the 1<sup>st</sup> and 2<sup>nd</sup> Respondents intended mass recruitment for 621 alleged vacant positions at the County Government of Nyandarua. The Petitioner challenges the said mass recruitment exercise contending that the same is clearly unprioritized, non-cost-effective, unsustainable and in all respect contravening the constitutional requirements on prudent and responsible use of public finances as well as the constitutional principle namely; **Fiscal Responsibility Principles** pursuant to the clear provisions of **Article 201 (d) of the Constitution** read together with the provisions of the Public Finance Management Act 2012 and the Public Finance Management (County Governments) Regulations, 2015.

7. The Petitioner further contends that the impugned recruitment exercise was commenced by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the face of the observations and recommendations by the Controller and Budget (**in exercise of her constitutional powers under Article 228 of the Constitution of Kenya**) to the 2<sup>nd</sup> Respondent in her Budget Implementation Review Report dated May, 2020 in respect of the first nine months of Financial year 2019/2020 wherein; the Controller of Budget had observed that the 2<sup>nd</sup> Respondent had reported a **huge wage bill, which accounted for 54.9 per cent of the total expenditure** in the first nine months of financial year 2019/2020 **thus constraining funding to other programmes** and, therefore, opining to the 1<sup>st</sup> Respondent to establish an optimal staffing structure in order to ensure a sustainable wage bill at the 2<sup>nd</sup> Respondent. (*See copies of excerpt pages extracted from the said Budget Implementation Review Report dated May, 2020 by the Controller of Budget at page 29 of the application bundle*).

8. The Petitioner's case is, equally, buttressed by the fact that the total expenditure on wages, emoluments, compensation and salaries for public officers at the 2<sup>nd</sup> Respondent for the financial year 2019/2020 stood at **32.2%** while the total expenditure on development stood at **28.8%** way below the constitutionally minimum requirement of **30%** and, therefore, blatantly contravening the **Fiscal Responsibility Principles** which mandates the 2<sup>nd</sup> Respondent to pursue the appropriate level of expenditure in maintaining a sustainable public economic growth and social development. (*See copies of excerpt pages extracted from the report dated September, 2020 by the Controller of Budget in respect of the County Governments Budget Implementation Review for the financial year 2019/2020 at page*

**34 of the application bundle).**

9. The Petitioner therefore contends, that unless the intended mass recruitment exercise is stopped by the court, the annual wage bill at the 2<sup>nd</sup> Respondent is likely to increase upwards by a further estimated projection in the sums of **Kshs.700million** annually and, consequently, surpassing way above the constitutionally required ceiling of **35%** of the county government's total revenue noting that there was/is no budgetary allocation to cater for the impugned mass recruitment in the 2<sup>nd</sup> Respondent's Itemised Budget Estimates for the financial year 2020/2021 as already admitted by the 2<sup>nd</sup> Respondent in the replying affidavit sworn by **Teresa K. Njeru**, a Deputy Director Human Resource at the 2<sup>nd</sup> Respondent.

10. In the results, it is the Petitioner's case that such state of affairs would adversely affect the constitutionally, budgetary ceiling allocation for development expenditure which is capped at a **minimum 30%** of the county government's budget thus militating against the legitimate expectation of the Nyandarua County taxpayers that the limited and scarce County's budgetary resources shall be applied in service delivery and development projects towards improving their livelihood and wellbeing and in compliance with the **Fiscal Responsibility Principles**.

11. Finally, the Petitioner contends that the intended mass recruitment is likely to cause wasteful expenditure of the rather limited resources due to inter-alia; duplication of functions/roles, ghost workers, non-essential staff e.t.c. For example, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are seeking to recruit in the impugned recruitment exercise, **ten (10) Ward Administrators (Job Group J)** whereas, only one (1) vacancy exists out of the 25 established county wards in the Nyandarua County. (*See annexure marked "PMM-6" from pages 40-45 of the application bundle both pages inclusive*).

12. The petitioner submits that, he has demonstrated that he has indeed established a prima facie case and further demonstrates that if the conservatory orders sought in the instant application are not granted the Petition herein will be rendered moot and nugatory if it ultimately succeeds as the harm and prejudice likely to be revisited upon the constitutional matters raised in Petition would be irreversible if the mass recruitment under challenge is not stopped by the court at the earliest awaiting the hearing and determination of the Petition.

13. Further he submits that if the conservatory orders are granted as prayed for, the Respondents would suffer no harm or prejudice since going by their own evidence herein, the Respondents are, simply, seeking to fill in vacant positions allegedly left from time to time by retirees who have since retired from employment at the 2<sup>nd</sup> Respondent between the years, 2011 – to – 2020 when the defunct municipal council was taken over by the 2<sup>nd</sup> Respondent. Infact, it would therefore appear that the Respondents have effectively been operating in service delivery during the said period when the subject positions were vacant and, therefore, it would not be unreasonable to argue that indeed there is no urgent need to proceed with the mass recruitment under challenge in the Petition.

14. On the other hand, if the conservatory orders are not granted, the Respondents would obviously proceed with the intended mass recruitment and, consequently, successful candidates would be employed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents prior to the hearing and determination of the Petition.

15. Consequently, in the event that the Petition ultimately succeeds, it would be untenable and actually impossible to reverse the entire process of recruitment and subsequent employment of the said individuals since any such action would be deemed as violation against the said individual's employment rights and legitimate expectation. In the results, the said individuals would, undoubtedly, be constrained to seek remedies before the Employment and Labour Relations Court against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents upon termination of their employment contracts pursuant to the resultant judgment in this Petition and which action would, therefore, lead to multiplicity of suits against the public policy.

16. It is worthy of note that in the **Nairobi Petition No. E282 of 2020, David Ndi & Others vs Attorney General and Others**, a five (5) Judge bench of the superior court while granting conservatory orders against the Independent Electoral and Boundaries Commission restraining it from facilitating and

subjecting the infamous Constitution of Kenya (Amendment) Bill 2020 to a referendum exercise recently, (on 18/02/2021) held that a court could grant conservatory orders in preserving the substratum of the Petition even in the knowledge that it had powers and obligation to declare unconstitutional and invalid any adverse actions undertaken in the pendency of the Petition *ex post facto*.

## **2<sup>ND</sup> RESPONDENT'S SUBMISSIONS:**

17. The respondents 1 and 2 submit that, the purpose of granting conservatory orders is to prevent violation of rights and fundamental freedoms and prevent the possible violation and as well maintain the subject matter pending hearing and determination of a petition. Further, the law on conservatory orders is that an Applicant seeking the orders must show that they are under threat of violation of rights or there exists a real danger of violation of their rights.

18. They rely on the case of **Center for Rights Education and Awareness (CREAW) & Another vs Speaker of the National Assembly & 2 Others (2017) eKLR** where the court was emphatic that;

***“A party who moves the court seeking conservatory orders must show the satisfaction of the Court that his or her rights are under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or petition.”***

19. They contend that, the Applicant has failed to show how his rights are or will be violated if the application is disallowed. The Applicant's sole reason to pray for the conservatory orders is that the 2<sup>nd</sup> Respondent will increase its wage bill by a total of seven hundred million shillings (700million). The Applicant can neither substantiate the source of this figure nor show how they arrived at it. The figure is fictitious as the County's Wage Bill trend proves that the 2<sup>nd</sup> Respondent is within the threshold required by the Controller of Budget even after recruitment is done.

20. The further it is submitted that, the Applicant has also in the application dated 20/01/2021 acknowledged and put forth facts that the existing wage bill of the 2<sup>nd</sup> Respondent stands at **32.2%** of the total revenue. This is well within the provisions of the Public Finance Management Act and the public Finance Management Regulations of 2015 which provide that not more than **35%** of the total revenue may go towards personal emoluments of county employees. The County Budget estimates indicate that the county is in a position to fully engage the staff in question in the recruitment exercise. The County shall recruit the essential staff in phases, therefore implying that the wage bill will still remain below the stipulated amount.

21. Another important aspect that an application of conservatory orders must convince the court of the existence of a real danger should the conservatory orders be denied. The Applicant herein has failed to show the existence of such a danger if the intended recruitment of employees goes on.

22. It is argued that, there is no real danger or any danger at all if the application is dismissed and the conservatory orders are not given. They rely on the case of **Martin Wambora v Speaker of the County of Assembly of Embu & 3 Others (2014) eKLR, Mwongo J** expressed himself as follows;

***“To those erudite words, I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the Court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention.”***

23. Thus submitted that, the Applicant has not showed existence of any danger which is imminent, evident true and factual and in the premises applicant has failed to show any valid reason warranting granting of the conservatory orders by this honorable court, thus the application lacks merit.

24. It is further argued that, the net effect of the decision of the application filed in this honorable court will have a trickle-down effect to the common citizens of Nyandarua County.

25. The 2<sup>nd</sup> Respondent also observes the need of efficiency, timely and adequate service delivery. The existing workforce is already overwhelmed and this can be made possible by enough workforce and therefore it is necessary to have new recruits on board.

26. The 2<sup>nd</sup> Respondent's decision to advertise the vacancies was out of the dire need for enhanced public service delivery by the citizens.

27. The 2<sup>nd</sup> Respondent has a duty to provide services to the public efficiently, effectively and adequately. The public must get value for their social contract with the government and that can only be done with enough workforce. Thus it is submitted that, the application herein defeats the duty of the 2<sup>nd</sup> Respondents. In light of that, it is submitted that it is in the public interest that the application be dismissed for defeating the very reason of a government existence which is service delivery.

28. They cite the case of **Kenya Association of Manufactures & 2 Others v Cabinet Secretary – Ministry of Environment and Natural Resources and 3 Others (2017) eKLR** where court had this to say about the grant of conservatory orders in public litigation cases;

***“.....in an application for a conservatory order, .....it is to be borne in mind that conservatory orders in public Law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest.”***

29. In sum it is submitted that, that the application has failed to reveal either an existing, ongoing or real danger of a violation of any rights or fundamental freedoms if the application is dismissed. The application can only be summarized as a fishing expedition without a substantial or qualified reason for bringing it in court. The application is a total waste of court's constrained time and resources.

#### **ISSUES, ANALYSIS AND DETERMINATION:**

30. Upon going through the material before me, I find the issues are;

***a. Whether the application herein meets the threshold for grant of conservatory orders?***

***b. If above in affirmative what are the terms for the grant of the sought orders?***

***c. What is the order as to costs?***

31. The Law

32. The **constitution of Kenya under Article 23** empowers the High court with jurisdiction and as read with **Article 165**, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights. **Article 165(3) (d)** grants this court jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with or in contravention of the Constitution.

33. I associate myself with the statement of my brother, W. Korir J in **Platinum Distillers Limited v Kenya Revenue Authority [2019] eKLR** that: -

***“The guiding principles upon which Kenyan courts make findings on interlocutory applications for conservatory orders within the framework of Article 23 of the Constitution are settled. The law, as I understand it, is that in considering an application for conservatory orders, the court is***

*not called upon and is indeed not required to make any definitive finding either of fact or law as that is the province of the court that will ultimately hear the petition. The jurisdiction of the court at this point is limited to examining and evaluating the material placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of conservatory orders. The court is also required to evaluate the pleadings and determine whether denial of conservatory orders will prejudice the applicant”*

34. The legal threshold for grant of granting a relief of conservatory orders were also laid down in a beaten path, of authorities in our Superior Courts including the Supreme Court of Kenya.

35. In **Gatirau Munya v Dickson Mwenda Kithinji & 2 Others 2014 KLR** the Supreme Court of Kenya held

*“.....Conservatory orders should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and proportionate magnitudes and priority levels attributable to the relevant causes.”*

36. In **Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others 2015 eKLR** the court held

*“foremost, the Applicant ought to demonstrate a prima facie case with a likelihood of success and that in absence of the conservatory order, he is likely to suffer prejudice.”*

37. Also in **Centre for Rights Education & Awareness & 7 Others v Attorney General HCC Pet. 16/2011** the court held;

*“it is my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potentially arguability is not enough to justify conservatory order but rather there must also be evident likelihood of success. The prima facie case ought to be beyond a speculative basis.”*

38. In considering whether or not to grant conservatory order, it is my view that the principle of proportionality plays not a remote role. As was stated by **Ojwang, AJ (as he then was) in Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** the Court, in responding to prayers should always opt for the lower rather than the higher risk of injustice. The learned Judge expressed himself as follows;

*“...Although the court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant”*

39. The core issue in the Petition and the application is whether the intended recruitment of the 621 personnel by the Respondents would increase wage bill by **Kshs.700million**, thus exceed the maximum threshold capped by Public Finance Management Act 2015 at **35%** of the total revenue that may go towards personnel emoluments of County employees. It is trite law and also under **Section 107,108 and 109 of the Evidence Act cap 80 of laws of Kenya** that;

*Ø 107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*Ø (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

***Ø 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.***

***Ø 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***

40. The petitioner is not happy with the intended mass recruitment of 621 alleged vacant positions at the county government of Nyandarua. The petitioner challenges the mass recruitment exercise contending that the same is clearly prioritized, non-cost effective, unsustainable and in all respect contravening the constitutional requirements on prudent and responsible use of public finances as well as the constitutional principle namely; fiscal responsibility principles pursuant to the provisions of article 201 (d) of the constitution read together with the provisions of the public finance management county governments regulations 2015.

41. The petitioner alleges and contends that unless the mass recruitment is topped by the court, the annual wage bill at the 2nd respondent is likely to increase upwards by a further estimated projection in the sums of Kshs. 700 million annually and consequently surpassing was above the constitutionally required ceiling of 35% of the county government's total revenue.

42. The Respondent denied and challenged the Applicant his source of the figure of Kshs.700Million alleged additional amount of the wage bill. It is not demonstrated how the Kshs.700Million is arrived at by the Applicant nor are there supporting document.

43. It is incumbent upon and burden of proof lies on the Petitioner Applicant to prove the amount which will be arrived at by recruiting 621 personnel by the County Government and that the amount will push the wage bill to over 35% of the wage bill capped by PFMA 2015 thus violating the law.

44. In terms of **Martin Wambura case; supra**, the demonstration of real danger must evident, imminent, true, actual and not fictitious to attract immediate remedial attention or redress by the court.

45. An allegedly threatened violation that is remote and unlikely will not attract the court's attention. Court does not see evidence, true facts disclosing real danger as stated above.

46. This figure is unsubstantiated and no evidence has been provided to show how the figure was arrived at. The figure is merely a conjecture by the petitioner and does not in any way indicate that the 2nd respondent will be outside the threshold required by the controller of budget as result of the recruitment.

47. I find that allowing the recruitment to proceed will not prejudice the petitioner as other viable remedies, including an award of costs and/or damages would be available if the instant petition succeeds. On the other hand, stopping the mass recruitment may occasion inefficient service delivery in the county government.

48. Further, I am of the view that the same can be determined by the court without necessitating the need to stop the said recruitment. With regard to the issue of public interest, it must be noted that effective service delivery in any institution requires employees who have to be hired and replaced in the event that they retire. In my view the petitioner and broader public will not suffer substantial or irreparable loss or damage if the orders sought are not granted.

49. Having considered the ground in support of the petition and the Respondents responses, it seems that this petition is merely speculative and devoid of any merit. The Petitioner has evidently failed to meet the required threshold for the grant of conservatory orders sought.

50. In sum the Applicant has not at this stage demonstrated a prima facie case nor real danger of violation of right to warrant grant of conservatory orders sought, as such, the balance of convenience indeed tilts in favour of dismissing the application.

51. Thus the court makes the orders:

***1. The application herein dated 20/01/2021 is dismissed with costs in the cause.***

***2. The Petition be heard on priority basis.***

**Dated, Signed and Delivered at NYAHURURU this 1<sup>st</sup> day of July, 2021.**

.....

**CHARLES KARIUKI**

**JUDGE**