



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CONSTITUTIONAL PETITION NO. 5 OF 2020**

**ALEX LUBWA MWELA.....PETITIONER**

**VERSUS**

**BENEDICT SHALIMBA MACHANJA.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**THE PERMANENT SECRETARY, MINISTRY OF INTERIOR**

**AND NATIONAL COORDINATION.....3<sup>RD</sup> RESPONDENT**

**THE DEPUTY COUNTY COMMISSIONER,**

**KAKAMEGA EAST SUB-COUNTY.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The cause herein was commenced by the petitioner, with respect to recruitment of an Assistant Chief for Bulovi Sub-Location. The vacancy was advertised, various persons applied for the position, and eventually the 1<sup>st</sup> respondent was picked as the successful candidate. The petitioner was not one of the candidates for the position, but is one of the residents of Bulovi Sub-Location. He expresses himself to be aggrieved by the recruitment exercise, which he argues was conducted in a manner that contravened various provisions of the Constitution, 2010, specifically Articles 3, 10, 27 and 56.

2. The response to the petition by the respondents is through the 2<sup>nd</sup> respondent. He has filed a Preliminary Objection, dated 14<sup>th</sup> July 2020, raising a point of jurisdiction, that the petition touches on the process of recruitment and employment of the 1<sup>st</sup> respondent, which is the exclusive preserve of the “Industrial Court.”

3. Directions on the disposal of the Preliminary Objection were given on 15<sup>th</sup> July 2020, to the effect that the same was to be canvassed by way of written submissions. The parties were given timelines within which to file and serve their respective written submissions. I have perused the file of papers before me. It is only the petitioner who has filed written submissions. It is surprising that the 2<sup>nd</sup> respondent raises a preliminary point of law, but fails to file written submissions, when given an opportunity to do so by the court. His preliminary point is, therefore, not explained.

4. The petitioner argues that the Constitution, at Article 165, grants jurisdiction to the High Court to entertain causes where questions arise with respect to interpretation of the Constitution, and specifically questions around anything that is said to have been done, under the authority of the Constitution or any law, being done in a manner that was inconsistent with or in contravention of the Constitution. He avers that the petition raises issues that are beyond employment and labour relations. The argument articulated is that the recruitment in question infringed on the rights a section of the population within the Bulovi Sub-Location, contrary to Article 56 of the Constitution, and acted outside of the provisions of Articles 3, 10 and 27 of the Constitution.

5. As said elsewhere above, the 2<sup>nd</sup> respondent did not file written submissions, and, therefore, there is no exposition of the Preliminary Objection. I note that the petitioner was not one of the candidates for the position of Assistant Chief. He has no personal interest, therefore, in the matter. That alone is an indication that the cause herein is not a pure employment and labour relations matter, to warrant the same being deemed as falling within the exclusive jurisdiction of the Employment and Labour Relations Court.

6. The Constitution is specific, at Article 165, that the court with jurisdiction to enquire into constitutional questions is the High Court. That

would mean that even in cases where a matter falls within the realm reserved for the courts envisaged under Article 162(2) of the Constitution, should the principal or primary issue for determination be a constitutional question, then the High Court, by dint of Article 165 of the Constitution, would have jurisdiction. Of course, the courts envisaged under Article 162(2) of the Constitution would still have jurisdiction to address any constitutional issues that arise within their mandate, and, therefore, the High Court may not claim exclusivity in that regard. However, in a case, such as the instant one, where the petitioner has no personal interest in the final outcome, and appears to have moved the court purely to have it consider whether the process of recruitment of the 1<sup>st</sup> respondent passed constitutional muster, then the High Court would be the proper port of call.

7. The conclusion that I have reached, therefore, is that the instant cause is properly before the High Court. The petition ought to be determined on its merits.

8. The petitioner has argued that the Preliminary Objection is not supported by any papers. I think that argument is futile. The gist of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distribution Ltd* [1969] EA, is that preliminary objections should raise pure points of law, and should not be founded on any evidence. If a preliminary objection is founded on evidence, then it ceases to be a preliminary objection. A preliminary objection should be sufficient to dispose of the matter on the point of law raised, and, therefore, obviating the necessity to look at the evidence. Therefore, the Preliminary Objection, dated 14<sup>th</sup> July 2020, is a proper one, its lack of merit notwithstanding.

9. In view of everything said above, the Preliminary Objection, dated 14<sup>th</sup> July 2020, is disallowed. The matter shall be listed for mention, for the purpose of giving directions, on the disposal of the petition, dated 26<sup>th</sup> May 2020.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 2<sup>nd</sup> DAY OF October, 2020**

**W. MUSYOKA**

**JUDGE**