



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[CORAM: MRIMA, J.]

JUDICIAL REVIEW NO. 4 OF 2018

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

1. THE MIGORI COUNTY GOVERNMENT

2. MIGORI COUNTY PUBLIC SERVICE BOARD.....RESPONDENTS

AND

NYANGI JOHN JUMA.....EXPARTE APPLICANT

JUDGMENT

1. On 11/12/2018 I delivered a ruling on the jurisdiction of this Court. I found that this Court has jurisdiction to deal with the suit.
2. The ruling dealt with several areas of interest to this judgment. They included the background of the suit, the dispute and the nature of judicial review. Due to the centrality of the issues I hereby incorporate the said ruling as part of this judgment by way of reference.
3. The Exparte Applicant herein, **Nyangi John Juma**, contention was that the Respondents were recruiting members of various Municipality and Town Boards without first, and so legally, creating the Municipalities and Towns which were to be governed by those Boards. He posited that the Respondents were putting the cart before the horse. He also contended that the Respondents' impugned actions are in flagrant disregard to the **Constitution** and the law.
4. Resulting from the aforesaid the Exparte Applicant herein sought the following remedies in the substantive Notice of Motion dated 27/12/2018: -
 1. **An Order of Certiorari to quash the decision of the respondents on their own accord in their Vacancy Announcement notice referenced MCPSB / 204/2018, MCPSB/205/2018 and MCPSB/206/2018 dated 23rd June 2018. Citing Awendo and Rongo as Municipalities without conferment as by law stipulated is illegal and ultra vires the law.**
 2. **An Order of Certiorari to quash the decision of the Respondents on their own accord in their Vacancy Announcement notice referenced MCPSB/ 204/2018, MCPSB/205/2018 and MCPSB/206/2018 dated 23rd June 2018 purporting to Recruit (8) Members for each of Awendo Municipality, Rongo Municipality and Migori Municipality totaling (24) members in contravention of section 14 of the Urban Center and Cities Act No. 13 of 2011.**
 3. **An Order of Prohibition to prevent the Respondents from making of any further publication and or continue in recruitment(s) of the Vacancy announcement notice referenced MCPSB/204/2018, MCPSB/205/2018 and MCPSB/206/2018 dated 23rd June 2018. Without fully complying with the law as provided in the Urban Center and Cities Act No. 13 of 2011.**
4. **The costs of this application.**
5. The Respondents opposed the Motion. They jointly relied on the Replying Affidavit of **Christopher Odhiambo Rusana** sworn

02/04/2019 and filed on 03/04/2019. The deponent was the County Secretary to the County Government of Migori, the First Respondent herein.

6. The Respondents admitted that the processes of establishing municipalities, towns and urban centres within Migori County in accordance with the law had been initiated, but were yet to be completed. They also admitted that the Board Members were being recruited before formally establishing the municipalities, towns and urban centres.

7. The Respondents however gave the rationale behind such state of affairs. They alluded that sometimes in 2017 or thereabout the National Government of the Republic of Kenya negotiated a Grant from the World Bank in the sum of US Dollars 300 Million for Kenya Urban Support Programme to be disbursed to 45 counties in the country. The Grant specifically targeted one of the Big Four Agendas of the National Government. They further stated that the World Bank codified the Grant in a Programme Appraisal Document which was unilaterally designed and drawn by the World Bank. The document was annexed as the Respondents' Exhibit 'COR 1'. It was also contended that the World Bank further set the criteria for the eligibility of the urban areas which were to benefit from the Grant. The World Bank also selected the benefitting urban areas. In Migori County three urban areas were selected. They were Migori, Rongo and Awendo.

8. The Respondents posited that by the time the programme was rolled out the regulations under **Section 53 of the Urban Areas and Cities Act No. 13 of 2011** (hereinafter referred to as 'the Cities Act') on the establishment of municipalities, towns and urban centres had not been put in place. As a result, **Condition 7** of the Programme Appraisal Document urged the benefitting counties to adopt the administrative structures which Kitui County had created. Counties were urged to establish town administrations with a town manager and a budget to effectively manage the urban areas and to implement the programme. That was however a stop gap measure and it was the point at which the Respondents came into the matter. Their role was limited to creating the structures for the programme implementation. The Respondents further posited that the foregone was the reason why it carried out the impugned advertisements.

9. The Respondents also stated that despite the requirements under the programme, the County Government of Migori later initiated the processes towards establishing municipalities, towns and urban centres within Migori County as provided for in the **Cities Act**. They clarified that the processes undertaken by the County Government of Migori under the **Cities Act** had nothing to do with the World Bank programme implementation. The Respondents also intimated that the processes were at advanced stages.

10. The suit was hence faulted for being misconceived and an abuse of the process of the Court. The Respondents prayed that it be dismissed with costs.

11. Directions on the hearing of the Notice of Motion were given. The parties proposed and this Court sanctioned the disposal of the Motion by way of written submissions. Both parties duly filed their respective submissions. They also referred to several decisions on their rival positions.

12. I have carefully read and understood the parties' pleadings, submissions and the decisions they relied on. Given the admissions by the Respondents it now seems that the dispute revolves on the legality of the Respondents' actions towards the implementation of the World Bank Programme.

13. I have carefully perused the Programme Appraisal Document. I have noted the Condition 7 of the document. I am persuaded that Condition 7 was an interim measure taken by the World Bank towards the project implementation. The resultants boards of those urban areas were hence transitional.

14. The County Governments were therefore required to comply with the **Constitution** and the **Cities Act** and legally establish the municipalities, towns and urban centres. Once established, the respective boards of the municipalities, towns and urban centres would then be put in place. Those boards would eventually take over the role of the transitional boards created under the World Bank programme.

15. The procedure towards establishment of the municipalities, towns and urban centres currently undertaken by the County Government of Migori under the **Cities Act** has not been impugned. The suit instead challenged the interventions taken by the World Bank during the time when the **Cities Act** was inoperational. In that case to expect the said interventions to be compliant with the then inoperative law would be unreasonable. In judicial review a Court is called to *inter alia* check on unreasonableness, arbitrariness or irrationality of administrative actions on the part of public entities. It is not expected that the Court would itself act arbitrarily, irrationally or unreasonably.

16. I therefore agree with the Respondents that the suit is misconceived. The prayers sought are therefore unavailable. Since the Exparte Applicant may not have known the nature and details of the Grant and the attendant conditions it will be unfair for him to bear the costs of the suit.

17. The upshot is that the Notice of Motion dated 27/12/2018 is unmerited and is hereby dismissed. Each party to bear its own costs.

18. Orders accordingly.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 15TH DAY OF OCTOBER 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Mohochi Counsel instructed by the firm of Messrs. Mohochi & Co. Associates Advocates for the Exparte Applicant.

Mr. Kisera Counsel instructed by the firm of Messrs. Omonde Kisera & Company Advocates for the Respondents.

Evelyne Nyauke – Court Assistant