



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CONSTITUTIONAL PETITION NO. 8 OF 2018.

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA 2010.

AND.

IN THE MATTER OF ALLEGED CONTRAVENTION ON CONSTITUTIONAL RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 28 47 AND 252 OF THE CONSTITUTION OF KENYA, 2010.

AND.

IN THE MATTER OF SHORTLISTING CANDIDATES FOR THE POSITION OF COUNTY CHIEF OFFICERS LANDS, URBAN/PHYSICAL PLANNING AND HOUSING.

AND.

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION) PRACTICE AND PROCEDURES RULES, 2012).

BETWEEN.

STEPHEN SOGONI CHUNE PETITIONER

VERSUS.

1. COUNTY GOVERNMENT OF BUNGOMA)

2. COUNTY PUBLIC SERVICE BOARD) RESPONDENTS

RULING.

The Petitioner Stephen Sogoni Chune filed this Petition naming the County Government of Bungoma, and County Public Service Board Bungoma as Respondents seeking for;

a) A declaration that the decision of the County Public Service Board of rejecting the application of the petitioner for the position of County Chief Officer lands, urban/physical & housing on grounds of being from different sub-tribe is discriminative and against the bill of rights.

b) An order that the County Public Service Board should consider and approve all applicants in line with their qualification and experience.

c) That the County Public Service Board acted ultra-vires the constitution of Kenya 2010 in shortlisting candidates from only one sub-tribe.

d) A declaration that the petitioner is entitled to affirmative action.

e) That the entire process of selection having been found faulted, the court should order a re-advertisement for a post of the County Chief Officer lands, urban/physical planning & housing.

In his affidavit in support of the petition the petitioner avers that he saw an advertisement for county chief officers lands, urban/physical planning and housing by the Bungoma Public Service Board dated 18th April, 2018 in Nation Newspaper. He met all the requirements set out

in the advertisement and also the requirements of Chapter 6 of the Constitution and applied. On 29.6.2018 he noticed that he had not been shortlisted as per the list of shortlisted candidates published in the Daily Nation. He noticed that all the shortlisted candidates were from one tribe and that his not being shortlisted was a discriminatory act which is repugnant to the provisions and spirit of the Kenyan Constitution 2010. He therefore filed this Petition seeking the reliefs above.

Mr. Makokha filed a Memorandum of appearance for the 1st Respondent County Government of Bungoma and simultaneously filed grounds of opposition. Richard Sabwami the Officer In-charge of Public Service filed a Replying Affidavit contending that the petitioner is an employee of the National Government under Ministry of Lands Housing and Urban Development and that he had been recruited previously by the 1st Respondent and they discovered other counties claimed his services. It is for these reasons that he was not shortlisted. The 1st Respondent denied any discrimination, in the shortlisting and contended that it followed due process.

The Respondent filed a Preliminary Objection challenging the jurisdiction of this court to hear and determine the petition. By consent both agreed to file submission on the preliminary objection and main petition.

It is now settled law that an issue of jurisdiction of a court once raised by a party has to be disposed of first.

The centrality of the issue of jurisdiction in the Judicial process was well stated in the decision in owners of **M.V. Lillians -Vs- Caltex Oil Kenya Ltd. [1989] KLR 1**, where Nyarangi J.A stated;

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The court therefore when pointed out must dispose of the issue of jurisdiction to when it is raised as a preliminary objection as in this case. In **Air Alfaras Ltd. -Vs- Paytheon Air Craft Credit Corporation & Another [2000] KLR 62** it was held;

“Any issue regarding jurisdiction ought to be considered first so that in the event of the court coming to the conclusion that it has no jurisdiction, the intellectual exercise of going into the merits of the application would be futile.”

And in the case of **Kakuta Maimai Hamisi -Vs- Peris Tubiko & 2 Others [2013] eKLR** the Court of Appeal said:

“So central and determinative is the question of jurisdiction that it is at once fundamental and over arching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue is a desideration imposed on courts out of decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in rain.”

Counsel for the respondent submitted that shortlisting, interviewing, selection, orientation and placement are all fundamental steps and or stages or recruitment, an essential process in employment. Without shortlisting and interviews, there cannot be employment in public service.

Being vital and progressive steps in employment, the Honourable court therefore lacks the requisite jurisdiction to hear and or determine the petition herein in view of the express provision of **Articles 162(2)(a) and 165(5)(b) of the Constitution** and **Section 12 of the Industrial Court Act** that confer such jurisdiction to the Employment and Labour Relations Court.

Mr. Namatsi for the Petitioner submitted that this court has jurisdiction as this is a petition premised on violation of the provision of the Constitution; the Employment and Labour Relations court established under Article 162 and ELRC Act which gives in jurisdiction deals with Employer – Employee relationships and that the Petitioner is not the Respondents employee as there is no contract of employment. He therefore submits that this is the court clothed with jurisdiction to entertain this Petition.

Article 165 of the Constitution establishes the High Court. Article 165(3) provides for the jurisdiction of the High Court. Article 162 creates courts with status of High Court.

Article 162 provides;

- (1) *The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).*
- (2) *Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-*
 - (a) *Employment and labour relations; and*
 - (b) *the environment and the use and occupation of, and title to, land.*
- (3) *Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).*
- (4) *The subordinate courts are the courts established under Article 169, or by parliament in accordance with the Article.*

Section 165(5) limits the jurisdiction of the High Court in respect to matters within the jurisdiction of the courts established under Article 162. It provides;

(5) The High Court shall not have jurisdiction in respect of matters –

(a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) Falling within the jurisdiction of the courts contemplated in Article 162(2).

Counsel for the Respondent in their Preliminary Objection contend that the substance of this petition is an Employment and Labour issues which should be canvassed in an ELRC Court and not the High Court. The jurisdiction of the ELRC Court created under Article 162(a) was spelt out in the ELRC Act Sec. 12 of the ELRC Act. The jurisdiction of the Employment and Labour Relations Court is derived from Article 162(2)(a) of the Constitution of Kenya which provides as follows:

“(2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to:

(a) Employment and labour relations.

And Section 12 of Employment and Labour Relations Court Act which states as follows:

“(1) The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including:-

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 employer’s organization and a trade unions organization;

d) disputes between trade unions;

e) disputes between employers organizations;

f) disputes between an employers’ organization and a trade union;

g) disputes between a trade union and a member thereof;

h) disputes between an employer’s organization or a federation and a member thereof;

i) disputes concerning the registration and election of trade union officials; and

j) disputes relating to the registration and enforcement of collective agreements.

(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer, a trade union, an employer’s organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose.

(3) In exercise of its jurisdiction under this Acts, the court shall have power to make any of the following orders:

1. interim preservation orders including injunctions in cases of urgency;

2. a prohibitory order;

3. an order for specific performance;

4. a declaratory order;

5. an award of compensation in any circumstances contemplated under this Act or any written law;

6. an award of damages in any circumstances;

7. contemplated under this Act or any written law;

8. an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law; or

9. any other appropriate relief as the Court may deem fit to grant

(4) In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the court considers just.

In determining whether this court has jurisdiction to handle this matter or not, I revert back to similar cases which have been dealt by this Court in similar circumstances. The list under Section 12 of the Employment and Labour Relations Act states that the court can deal with any matter arising out of an employment relationship. Nduma J in *Nick Githinji Ndichu Vs. Clerk Kiambu County Assembly and Another [2014] eKLR* where he held as follows:

“It is clear from the foregoing that the law is not concerned with the method of acquiring an employment. The law does not concern itself with whether the person was appointed or elected.

Rather the person must:

Be having an oral or written contract of service,

Be receiving a wage/salary for the service rendered.....”

For one to access the jurisdiction at ELRC he must demonstrate that there exists an employer – employee relationship; that there is an oral or written contract of service or that the issue is a dispute falls within the provision of Section 12(1) of the ELRC Act. Though Advertisement, Shortlisting, Interviewing are all steps towards recruitment and steps towards creating an employer – employee relationship, they are not in my view envisaged in Section 12 and which will place this petition under the jurisdiction of the Employment and Labour Relations Court. That being so I find that this court has jurisdiction to hear and determine this petition and dismiss the preliminary objection by the Respondent.

The second issue for determination by this court is the merit of the petition filed by the petitioner.

The petitioner has brought this petition alleging violation of the rights under Article 22, 27, 47 and 252 of the Constitution. Article 22 grants every person the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed or is threatened. Article 27 provides for equality and freedom from discrimination. Article 47 relates to the right to fair Administrative Action that is expeditious, efficient, lawful reasonable and procedurally fair and Article 25(2) provides for the general functions and powers of independent commission and offices.

The petitioner, in response to the advertisement by the Respondent, applied for the position of Chief officer Lands Urban/Physical Planning & housing. He met the qualification and applied. He holds a Masters degree in Urban & Regional Planning, a Bachelors of Arts (Geography & Sociology) and is registered as member of the relevant Professional Bodies. He has worked with Ministry of Housing, Lands, County Government of Bungoma and Director of Physical Planning with County Government of Kakamega from June 2017 to date. According to his C.V. attached to this application with these credentials the Petitioner avers that he was qualified for the position advertised. He contends that the only reason why he was not shortlisted despite having all the qualification and vast experience is that he came from a different sub-tribe than that of the shortlisted candidates. He stated that the shortlisted candidates were all from the Bukusu sub-tribe.

The 2nd Respondent in a Replying Affidavit sworn by Richard Sabwami Keya deponed that the Petitioner was employed by the County Government of Bungoma on 22.12.2015 as County Director Lands Urban and Physical Planning by letter dated 22.12.2015 on contract. While still on its employment the Respondent received a letter dated 5.2.2016 informing the Respondent that the petitioner has been seconded by the Ministry of Land Housing and Urban Development to County Government of Bungoma. By letter dated 17.5.2017 County Government of Kakamega sought for his release upon transferring his services to the County Government of Kakamega. He took up the position in County Government of Kakamega where he is employed to date according to the C.V attached to this petition. For these reasons the Respondent depones that it became difficult to shortlist the Petitioner for the Post advertised. The 2nd Respondent denied any discrimination in the shortlisting or favoritism in the shortlisting candidates, or that all the shortlisted candidates are Bukusu while the Petitioner is a Tiriki by sub-tribe.

The substance of the Petitioner's petition is that he was discriminated against because of his sub-tribe which actions runs contrary to the provisions of Article 27 of the Constitution. In *Rose Wangui Mambo & 2 others Vs. Limuru County Club & 17 others [2014] eKLR* addressed itself to this aspect and in borrowing from the case of *Peter K. Waweru Vs. Republic [2006] eKLR* defined discrimination as follows:-

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions bysex whereby persons of one such description are subjected to.....restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.....Discrimination also means unfair treatment or denial or normal privileges to persons because of their race, age, sex.....a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured”

Article 27 of the Constitution is grounded on the UN Declaration of Human Rights which provides for the principle on non-discrimination. *The Principle of equal and non-discrimination has its underpinnings in various International conventions which now form part of our laws*

by dint of Article 2(5) and (2)(6). The United Nations Universal Declaration on Human Rights (UDHR) provides at Article 1 that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

Discrimination of any nature is abhorred by not only by our Constitution but also by UN declaration of Human Rights. For the petitioner to demonstrate that he has been discriminated against he must show;

- 1) That he was afforded different treatment.
- 2) That the treatment is attributable wholly or substantially done to his tribe.
- 3) That such treatment was not afforded to other people or class of people.
- 4) On that he was denied privileges or opportunity available to others on the basis of this race or tribe.

The main thrust of the Counsel for Petitioners submission is that his not being shortlisted was an act of discrimination. He submits that he Petitioner possessed all the academic and other requirements needed in the advertisement. From the documents he has annexed to this petition there is no doubt that he had the qualifications. In his letter of application he disclosed that he had worked as Director, of Lands Urban and Physical Planning in Bungoma for one and half years and is currently Director of Physical Planning Kakamega County. Having held that position before, it is clear he met the qualification for shortlisting.

The petitioner averred that despite his qualification he was not shortlisted because of his sub-tribe the Tiriki. He submitted that all those who were shortlisted were from the Bukusu Sub-tribe. The petitioner has annexed the copy of the Advertisement in Daily Nation dated 29.6.2018 which indicates Names of 7 shortlisted candidates, for CEC Lands Urban and Physical Planning. It indicates that names, ID Numbers, Gender, Constituency of Respondents and qualifications.

The names and place of residence indicated are;

1. DAVID KINISU SIFUNA ID.21650639 M TRANS-NZOIA
2. JOYCE MUYOKA KILWAKE ID.25942416 F TRANS-NZOIA
3. ROBERT I. SIMIYU ID.10718573 M KANDUYI
4. THOMAS MUKHWANA ID.9996317 M KIMILILI
5. PETER SIGAK MUDOGO ID.10856718 M MT. ELGON
6. DR. PETER NYONGESA ID.11455707 M WEBUYE EAST
KHAKINA
7. GEORGE WANJALA ID.7993123 M WEBUYE EAST

In this advertisement there is no indication of the tribe or sub-tribe of the shortlisted candidates. The Petitioner has not placed any material to show each of the candidates sub-tribe. This court cannot ascertain the sub-tribe by names of the persons. For him to claim discrimination, he should place such material in court for the court to ascertain the genuineness of his claim. This he has not done.

The 2nd Respondent in his Replying Affidavit set out the employment history of the petitioner. They demonstrated that indeed they had employed the petitioner in December 2015 in the same post and with clear terms of service. On 5.2.2016 the petitioner sought to alter this terms of employment by seeking for secondment by the Ministry of Lands, Housing and Physical Planning and by letter dated 5.2.2016 he was seconded by the Ministry; pursuant to a letter from the Public Service Commission dated 27.1.2016. The Petitioner on or about May 2017 (which is last year) he requested to transfer his services to County Government of Kakamega. He left the Services of the Respondent and now works for County Government of Kakamega. It was his movement to Kakamega County which created the vacancy the 2nd Respondent was filling by this advertisement. That is the employment history information the 2nd Respondent had to consider when shortlisting. In my view this is the history the Respondent could not ignore. The petitioner admits in his C.V that he is indeed an employee of the National Government now working in Kakamega.

The petitioner having left the employment barely 1½ years after employment by secondment to another County, any employer could be naïve if they considered him the job which he had ran away from creating the vacancy they were filling. The non shortlisting was as prudent act by an employer who has a duty to the inhabitants of County of Bungoma. I find the reasons advanced for that Respondent not shortlisting the petitioner credible. In the result, I do not find merit in this petition which is hereby dismissed. I make no order as to costs.

Dated and Delivered at Bungoma this 13th September, 2018.

S.N. RIECHI

JUDGE.