



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW APPLICATION NO. 12 OF 2015

IN THE MATTER OF AN APPLICATION BY STEPHEN KIPNGETICH
TOWETT FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS

IN THE NATURE OF CERTIORARI AND PROHIBITION TO QUASH

THE DECISION OF THE NAKURU COUNTY PUBLIC SERVICE

BOARD OF APPOINTING PAUL KIPNGETICH TUWEO

AS THE WARD ADMINISTRATOR TINET WARD

AND

IN THE MATTER OF ARTICLES 23(1) (3f), 27(1), (2),

(4), 56(c) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT &

SECTION 8 AND 9 OF THE LAW REFORM ACT

REPUBLIC.....APPLICANT

VERSUS

THE NAKURU COUNTY PUBLIC SERVICE BOARD.....RESPONDENT

STEPHEN KIPNGETICH TOWETT.....SUBJECT

PAUL KIPNGETICH TUWEL.....INTERSTED PARTY

JUDGEMENT

By way of an Exparte Chamber Summons dated 21/4/2015 the applicant **STEPHEN KIPNGETICH TOWETT** sought inter alia the following orders:-

“(b) **THAT** this honourable court be pleased to grant leave to the applicant to bring Judicial Review Proceedings by way of an order of Certiorari and prohibition

(c) **THAT** the leave once granted shall be for orders of Certiorari and prohibition to bring to this court an order to [sic] quash the decision by the respondent to appoint **PAUL KIPNGETICH TUWEL** as the Ward Administrator of **TINET** Ward in Nakuru County and to restrain the respondent from deploying Paul Kipngetch Tuwei to Tinet Ward as an Administrator.

(d) **THAT** once granted, the said leave to operate as a stay of the appointment of one **PAUL KIPNGETICH TUWEI** as the Ward Administrator Tinet Ward in Nakuru County.

(e) **THAT** the costs of this applicant be provided for

The application was supported by the applicants Statement of Facts and Verifying Affidavit both dated 6th May 2015. **Hon Justice A. Mshila** did grant leave to commence Judicial Review Proceedings on 22nd April, 2015.

In response to the application the Respondent being **The Nakuru County Public Service Board** and the Interested Party Paul Kipngetich Tuwei filed a Replying Affidavit sworn by the County Secretary and Head of Public Service for Nakuru one **J. M. MOTARI** on 23rd July, 2015.

This application arises from the appointment by the respondent of the Interested Party as the Ward Administrator for Tinet Ward in Nakuru County. The brief facts are that on 29th September, 2014 the respondent put out an advertisement in the Daily Nakuru Newspaper inviting applications for the position of Ward Administrators for Nakuru County. Thereafter qualified applicants were shortlisted and interviews took place on various dates between 9th and 23rd December.

The interested party's name did not appear amongst the shortlisted candidates in the list released to the public. Nevertheless he was interviewed on 23rd September, 2014 and was subsequently appointed as the Ward Administrator for Tinet Ward in Kuresoi South Constituency of Nakuru County.

The applicant who had also applied for the same position was interviewed on 10th December, 2014. However, he was unsuccessful and did not secure the position. The applicant has challenged the appointment of the Interested Party on the basis that the latter was not even shortlisted for the position.

The Applicant further argues that being a member of the marginalized Ogiek Community, his application merited consideration in priority over that of the other applicants. He argued that the appointment of the Interested Party was prejudicial to himself and to the other applicants who had applied and were shortlisted. The decision to appoint the Interested Party was said to have been founded upon improper and irrelevant considerations, the same was discriminatory and was made ultra vires and therefore ought to be quashed.

In the reply it was conceded that there were 635 applicants for the position of Ward Administrator. The Interested Party applied on 8th October, 2014 and was one amongst 289 candidates who were found suitable and was shortlisted for the position. However the respondent explained that the name of the Interested Party together with the name of four other successful candidates were inadvertently omitted from the typed list of shortlisted candidates. At a meeting held on 3rd December, 2014 the respondent resolved that the candidates whose name had been so omitted, be included. This was done and these candidates were notified of their interview dates by phone. The Interested Party attended his interview on 23rd December, 2014 and signed the interview register as proof of this fact.

The respondent therefore argues that the appointment of the Interested Party was based solely on the fact that he emerged as the most suitable candidate. His deployment to Tinet Ward was based not tribe but on his credentials as a civil servant who was capable of serving in any ward in the county. The respondent asked the court to dismiss the application as lacking in merit.

The court gave directions that the application be disposed of by way of written submissions. Both sides did duly file their written submissions. I have carefully perused the written submissions filed and I note that the respondent and the Interested Party did in their submission argue that this court had no jurisdiction to determine this applicant.

In the case of **OWNERS OF MOTOR VESSEL 'Lillian S' Vs CALTEX OIL (Kenya) Ltd 1989 KLR 1**. Hon Justice Nyarangi Judge of Appeal (as he then was) held as follows

..... 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.

In view of the fact that a challenge has been made to this court's jurisdiction to determine this application, it is necessary to first determine that question before delving into the merits of the application.

The respondent and the Interested Party through their counsel submit that this application or grievance ought first have been filed before the Public Service Commission as provided for by Section 77(1) and (2)(a) of the County Government Act. In failing to first go before the Public Service Commission and instead coming directly to the High Court the applicant breached the statutory set out provisions for dispute resolution and for this reason the High Court has no jurisdiction over the matter.

Section 51(1) of the County Government Act 2012 establishes the Office of Ward Administrator. Section 51 subsection (2) of the same Act vests in the Respondent the power to appoint ward administrators. In this application the applicant has challenged the process of recruitment as well as the ultimate decision made on the recruitment process. He has alleged that the process was flawed because the person eventually appointed did not apply for the position neither was he shortlisted for the same. Secondly the applicant argues that as a member of the marginalized Ogiek Community and as a person who hails from Tinet Ward, he ought to have been appointed as ward administrator.

Section 77 of the County Government Act, 2012 provides as follows

“77(1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any public officer may appeal to the Public Service Commission (in this part referred to as the (“Commission”) against the decision

(2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of:-

(a) Recruitment, selection, appointment and qualifications attached to any office

(b)”

In any case where there exists statutory mechanism for dispute resolution, an aggrieved person must satisfy the court that he was exhausted that statutory mechanism before presenting that dispute to the court’s for resolution. **IN THE SPEAKER OF THE NATIONAL ASSEMBLY Vs THE HONOURABLE JAMES NJENGA KARUME**, Civil Application No. 192 of 1992 it was held

“Where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution and or any Act of Parliament, that procedure should be strictly followed”

Likewise in **INTERNATIONAL CENTRE FOR POLICY and CONFLICT & 5 OTHERS Vs ATTORNEY GENERAL & 4 OTHERS 2013 eKLR** the court held that

“Where there exists sufficient and adequate mechanisms to deal with a specific dispute by other organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted” (my emphasis).

In **JAMES MARETE & OTHERS Vs COUNTY GOVERNMENT OF KAJIADO & 22 OTHERS 2015 eKLR**, a challenge had been made to appointments of the Kajiado County Public Service Board on the basis that the appointment did not accord with the Constitutional requirement for diversity. In that case the court held as follows:-

“Firstly it is my view that the legislature could not have intended to establish a dispute resolution mechanism, and then render it redundant immediately by giving parties the option to choose whether to follow it or not. Read as a whole, the provisions of Section 77 of the County Governments Act evince an intention to have all disputes arising out of the appointments by the County Service Boards dealt with by the Public Service Commission”.

That case is on all fours with the present one. The body vested by Statute with the mandate to hear and determine any dispute concerning the appointment of the Interested Party in the first instance is the Public Service Commission. The applicant by-passed this statutory provisions for dispute resolution and came directly to the High Court. No reason is given as to why the provisions of Section 77 of the County Government Act were ignored. For this reason I find that this court indeed lacks jurisdiction over this matter. In the **Motor Vessel ‘Lilian S’** Case it was held:-

“Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”

I will therefore not delve into the merits of this application.

Based on the foregoing, the present suit is struck out for want of jurisdiction with costs to the respondent.

Dated in Nakuru this 7th day of February 2017.

MAUREEN A. ODERO

JUDGE