



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CONSTITUTIONAL PETITION NO. 1 OF 2015

IN THE MATTER OF ARTICLE 10,22,23(3) and 165(3) (d) OF THE CONSTITUTION

AND IN THE MATTER OF THE COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF THE COUNTY PUBLIC SERVICE BOARD OF WEST POKOT COUNTY

BETWEEN

CHANG'OROK KOMOLNG'OLE ERICK.....PETITIONER/APPLICANT

AND

COUNTY GOVERNMENT OF WEST POKOT..... 1ST RESPONDENT

THE PUBLIC SERVICE BOARD OF THE COUNTY GOVERNMENT

OF WEST POKOT2ND RESPONDENT

POWON L. KAPELO3RD RESPONDENT

HON. ATTORNEY GENERAL..... 4TH RESPONDENT

RULING

There are four prayers to this application as follows:-

(1) That this application be certified as urgent, and that the service of the same be dispensed with in the first instance.

(2)That pending the interpartes hearing of this application, this honourable court be pleased to issue a conservatory/interim order staying the appointments of the 3rd Respondent herein as the Deputy County Secretary and as Acting County Secretary and which appointments were made on the 19/10/2015 by the 2nd Respondent.

(3)That upon interparte hearing the stay of the appointments of the 3rd Respondent herein, as the Deputy County Secretary and as Acting County Secretary and which appointments were made on the 19/10/2015 by the 2nd Respondent, be confirmed, and the same to remain in-force until such time when the pending petition would be heard and determined.

(4) That the cost of this application be provided for.

The first and the second prayers were taken care of during the *ex parte* hearing on 5/11/2015. The court would therefore proceed to consider prayers 3 and 4.

The background of this application is that the Public Service Board of the County Government of West Pokot wanted to recruit the County Secretary of West Pokot County. They advertised for the position and applicants were invited to apply. They did so and shortlisting was done. Interviews were also conducted. The first three candidates results were as follows:-

(1) Mr. Joel L. Arumonyang - 84.5%

(2) Mr. Powon L. Kapelo 80.6%

(3) Dr. Mike T. Parklea - 77.4%

The best, **Mr. Joel L. Arumonyang**, got the job. However on **8/7/2015** he was dismissed from the employment by the Governor - West Pokot County. The said dismissal was challenged in court vide ***Miscellaneous Civil Application No. 38 of 2015***. The court granted the Applicant a stay of the purported dismissal. The letter dismissing Joel L. Arumonyang states at the end:-

"Further in view of this decision, you are required to report to your office on 8/7/2015 at 10.00 am to hand over the office to the appointed Deputy County Secretary and to conclude arrangements for exit from service".

Mr. Powon L. Kapelo was appointed as Deputy County Secretary on **19/10/2015** vide a letter signed by the Chairman County Public Service Board, West Pokot, one Mr. Jackson Nguriarengan. However there are letters attached by the Applicant showing he was in office even as of **10/8/2015** as Deputy County Secretary. It is this appointment of Powon L. Kapelo as the Deputy County Secretary and as Acting County Secretary on **19/10/2015** that is seriously contested by the Applicant.

The Applicant in his supporting affidavit alleges that:-

- **The vacancy of Deputy County Secretary was never advertised and no applicants were interviewed for the post and that violated the provisions of Articles 10 and 232 (/) of the Constitution as well as the provisions of Section 60, 62, 63,64 and 66 of the County Government Act.**
- **The office of Deputy County Secretary is not provided for in the County Government Act, and nor was it created in the manner provided for by the County Government Act.**
- **Given the stay orders in place in File No. 38 of 2015, the office of County Secretary was and is not vacant.**
- **The applicant avers that if the position of Deputy County Secretary and Acting County Secretary had been advertised, he would have applied as well as many other qualified members of the public.**
- **He, the Applicant, also alleges that the two offices of Deputy County Secretary and Acting County Secretary were not budgeted for since by 19/10/2015 the budgetary process had been long concluded.**

The Applicant therefore urges this court to make a finding that the appointments of the 3rd Respondent (Powon L. Kapelo) as Deputy County Secretary and Acting County Secretary are outrightly unconstitutional and a violation of the rights of the people of West Pokot County to good governance and good use of resources.

The application is opposed by the Respondents. They argue that the Applicant does not have *locus standi*. He has brought the application on behalf of the dismissed Secretary of West Pokot, one Mr. Joel Arumonyang. This court is urged by the Respondents to be on guard against abuse of court process as this is the 9th matter connected to the said dismissal issue.

The County Public Service Board of West Pokot, is averred by the Respondents, complied in appointing of the 3rd Respondent with provisions of **Section 63(1) and (2)**; And **Section 64** of the County Government Act.

The Sections empowers the Board to make appointments on its own motion on account of best public service and treatment of public officers. Mr. Joel Arumonyang, the County Secretary had absconded duty of which occasioned the need to fill the position.

Powon L. Kapelo was the second best in a competitive process for the appointment of the County Secretary. The process he underwent is recognized by the law. He was interviewed and found qualified. His competence is not in doubt. His name was forwarded to the County Government by the Transitional Authority, in accordance to **Section 4** of the Devolved Government Act.

Section 59 to 63 of the County Government **Act No. 17 of 2012** shows Public Service Board can create office and appoint officers to the offices. Their action was not therefore contrary to the law.

The Applicant is said by the Respondents, states that if the position was advertised for he would have applied, of which shows he is pursuing a personal interest rather than a public one.

The issue for determination by this court is whether the appointment of Mr. Powon L. Kapelo (3rd Respondent) as the Deputy County Secretary and as Acting County Secretary on 19/10/2015, by the Public Service Board of the County Government of West Pokot, was proper; that is in accordance to the applicable laws. In making this determination I will rely heavily on the provisions of the County Governments Act of which was enacted to give effect to Chapter Eleven of the Constitution, to provide for County Governments powers, functions and responsibilities to deliver services and for connected purposes. The other is the Constitution of Kenya, 2010.

Section 59 (1) (a) and (b) empowers the County Public Service Board, on behalf of the County Government, to:-

(a) establish and abolish offices in the County Public Service.

(b) appoint persons to hold or act in offices of the County Public Services including in the Boards of cities and urban areas within the County and to confirm appointments.

Given the above provisions there is no doubt that the County Public Service Board, on behalf of the County Government can establish and abolish offices in the County Public Services and can also employ officers to serve in those offices.

Section 60 (1) states the circumstances under which the County Public Service Board can establish public offices within the County Public Service. Of importance are **Sections 60 (1) (b), (c), (t) and (g)**.

They provide as follows:-

(b) there exists no other public office in the County Public Office discharging or capable of discharging the duties for which the County is requested to establish another office.

(c) upon establishment of the office the office shall be vacant to be filled competitively and transparently in accordance with the prescribed appointment or promotion procedures.

(f) the County Government entity has prudently utilized offices previously provided in its

establishment, and

(g) funding for the office to be established is duly provided for.

The office that existed is of County Secretary. The Public Service Board of the County Government of West Pokot created another office of Deputy County Secretary. The functions of this latter office can be easily discharged by the office of the County Secretary. In creating the office of Deputy County Secretary, the Board therefore acted contrary to clear provisions of **Section 60 (1) (b)** of the County Government Act.

It is not in dispute that Powon L. Kapelo had been shortlisted for the position of the County Secretary. After the interviews he was number 2. That process, if I may say, was done competitively and transparently in accordance to provisions of the law. However, when the Board created the office of Deputy County Secretary, this was a new position. They ought to have complied with the provisions of **Section 65 (0 (0 and (2)**.

Section 65 (i) (f) is about the need for open and transparent recruitment of public servants. **(2)** pronounces the overriding factors for consideration which are merit, fair competition and representation of the diversity of the County.

The position of the County Secretary had been advertised in the year 2013 and filled within the year. The said process was used on 19/10/2015 to appoint Powon L. Kapelo to the position of Deputy County Secretary. Two major issues arises here:-

County Secretary and Deputy County Secretary are different positions. The position of Deputy County Secretary was never advertised for. Mr. Powon L. Kapelo never applied and was not interviewed for it. The basic fact is that he was employed for a job he never applied for and neither interviewed for. This favoured him against all other qualified persons who may have wished to apply for the position and compete with him for it if he would have applied.

Time also changes almost everything. The scenario in the year 2013 could hardly have replayed back in the year 2015 even if the advertisement was for the position of the County Secretary leave alone Deputy county Secretary. This more the reason why even if the said office had fallen vacant, the Board should have fully complied with the provisions of **Section 66** of the County Government Act. The Section reads:-

"If a public office is to be filled, the County Public Service Board shall invite applications through advertisement and other modes of communication so as to reach as wide a population of potential applicants as possible and especially persons who for any reason have been or may be disadvantaged".

It is not simply the question of whether the person employed qualifies for the position, but whether the position was competitively filled. One interview, and a list of shortlisted candidates cannot be used as a pool from which the Board would be entitled to pick candidates for different offices all the years. Such a process would unfairly shut out fresh qualifiers and even those who may have performed poorly in those interviews but have so far improved their skills.

The Applicant submitted that there was no funding for the new office. **Section 60 (1) (g)** obliges the Board to ensure funding for the new office is provided for. No evidence was adduced by the Respondents to the contrary. This provision was therefore not complied with in establishment of the office of the Deputy County Secretary by the Board.

The Article of the Constitution offended by the Board in the appointment of Powon L. Kapelo as the Deputy County Secretary is 232 **(1) (g)** which embraces fair competition and merit as the basis of appointments and promotions.

The holdings in *Judicial Review Application No. 271 of 2014, Between Republic -vs- The Secretary County Public Board and Wajir County Government 12015] KLR*; And also in *Bungoma Petition Number 2"A" of 2014*, of which were relied on by the Applicant, well supports the factual and legal positions in this case.

The bottom line is that this application is merited and is granted as prayed with cost to the Applicant.

Ruling read and signed this **9th** day of **March, 2016** in presence of Mr. Kiarie for the Applicant and M/s. Chebet holding brief for Mr. Gitonga for the Respondent.

S.M. GITHINJI

JUDGE

09/03/2016