



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. 30 OF 2014

**IN THE MATTER OF ARTICLES 1, 2, 3, 4, 10, 19, 20, 73 AND 265 OF THE CONSTITUTION
OF KENYA, 2010**

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION

BETWEEN

NAKURU COUNTY HUMAN RIGHTS NETWORK (NAHURINET)....PETITIONER

VERSUS

NAKURU COUNTY GOVERNMENTRESPONDENT

AND

JOSEPH LENAIINTERESTED PARTY

JUDGMENT

1. The Petitioner, **Nakuru County Human Rights Network**, is a registered society involved in human rights advocacy and good governance. By a Petition dated 30th April, 2014 the Petitioner seeks the following reliefs:

a) A declaration that the process and manner and decision in which the County Government of Nakuru had managed or intends to appoint or has appointed the interested party is unconstitutional, illegal and embarrassing to the residents of Nakuru County and is hence null and void.

b) A declaration that the interested party is not fit and proper with due regard to his honesty, dignity, personal integrity and suitability and hence his appointment shall be inconsistent with the constitution and therefore invalid.

c) The Petitioner be paid costs

2. Simultaneously with the Petition, an interlocutory application was filed under a Certificate of Urgency. The Chamber Summons seeks a stay of the appointment of the Interested Party pending the hearing of the matter.

3. The application is supported by the grounds on the face of it and the affidavit of **David Kuria** sworn on 30th April 2014. The deponent is the Chief Executive Officer of the Petitioner. He avers that the process of appointment of the Interested Party for the position of Director of Medical Services ignored public concerns over his integrity hence bringing dishonor to the Public Office within Nakuru County.

4. In response, the Respondent filed a Notice of Preliminary Objection dated 28th May 2014. He seeks the application to be struck out/dismissed with costs on the following grounds to wit:

- a) **That the application is bad in law, unsustainable and totally incompetent**
- b) **That the application is frivolous, vexatious and an abuse of the Court process**
- c) **That this honorable court is not the correct forum to lodge this petition and as such the court has no jurisdiction to entertain the petition.**
- d) **That the petition is instituted prematurely and cannot stand**
- e) **That the petitioner's claim does not warrant the intervention of the constitution and the Petition (which is premised on the Constitution) is therefore an abuse of the process of the Court**
- f) **That the petitioner did not follow due process in bringing the Petition.**

5. On 18th June, 2014, the matter came up for hearing of the Preliminary Objection. The Learned Counsel, **Mr. Chege** was present for the Petitioner whilst **Mr. Kahiga** and **Mr. Wambeyi** represented the Respondent and Interested Party respectively.

6. Mr. Kahiga condensed his submissions into two main grounds. He stated that the Petition relates to the appointment of the Chief Executive Officer for Health Services only. That **Section 77** of the **County Government Act** provides that any person dissatisfied by a decision of the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any public officer may appeal to Public Service Commission against the decision. According to counsel, the complaint raised by the Petitioner falls under **Section 77(2)** of the Act as it raises issues touching on recruitment, selection, appointment and qualification of the Interested Party to hold public office. Therefore the matter ought to have been referred to Public Service Commission.

7. He contended that where there is a provision in a statute setting out the procedure then a party cannot rush to court without exhausting the laid down procedure. He relied on the decisions in **James Akelerio alias Maguu & Another V. Moses Kasaine Lenolkilai & Others**, Nakuru High Court Petition No. 17 of 2014 and **Peter Ochara Anam & 3 Others V. Constituencies Development Fund Board & 3 Others**, Kisii High Court Petition No. 3 of 2010 in support of this argument.

8. Further, counsel submitted that the complaint does not warrant intervention of a constitutional court. Under **Article 2** of the Constitution, the constitution can only be invoked on serious matters especially where there is violation of a right and or freedom. According to counsel the issue of selection of employees whose decision had not be made is not only speculative but trivial. He relied on the decision in **Peter Ochara Anam & 3 Others V. Constituencies Development Fund Board & 3 Others**, Kisii High Court Petition No. 3 of 2010 where the court adopted the holding in **Harrikson V. Attorney General**, (1979) WLR 62 that the right to apply to the High Court for redress when any human right or fundamental freedom is likely to be contravened is an important safeguard but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial controls of administrative action.

9. Mr. Wambeyi associated himself with the submission of Mr. Kahiga. In addition, he submitted that the Petitioner had not demonstrated the specific right violated or likely to be violated by the Respondent. He stated that the selection process had not crystallized and that the petitioners were acting on rumors. He urged the court not to entertain the Petition.

10. Mr. Chege opposed the Preliminary Objection. He submitted that there is no other forum empowered by constitution or law to ventilate the issues raised in the petition other than the High Court. He contended that the issue of integrity of the interested party could not be canvassed under the provision of **Section 77 of the County Government Act**. According to counsel the operative word under Section 77 is “May” which is not mandatory in nature. Moreover he submitted that the Public Service Commission mandate was restricted to recruitment, selection and appointment of an officer but his integrity.

11. Counsel further submitted that the court had jurisdiction to entertain the matter. **Article 5 165** of the Constitution confers to the High Court the requisite jurisdiction to deliberate on matters touching on integrity of public officers. He urged the court to find that the Preliminary Objection was premature and wrongly instituted by Respondent in order to derail the expeditious disposal of the Petition.

ISSUES FOR DETERMINATION

12. This court upon hearing the submissions of both Counsels finds that the issues for determination relate premature pleadings. Either the Petition or the Preliminary Objection is premature.

ANALYSIS

13. The Petitioner in its application uses the words “... **the Nakuru County Government intends to appoint...**” and/or “...**is in the process of appointing...**” in its prayer and is seeking a stay of the decision of the appointment of the Interested Party as the Chief Executive Committee Member for Health Services due to issues on integrity pending the hearing and determination of the Petition.

14. The Petitioner through its Chief Executive Officer avers that the Respondent advertised and had shortlisted the Interested Party as a prospective candidate for the aforementioned position.

15. It is further averred that the Petitioner had received “**convincing information**” that the Respondent had already arrived at a decision to appoint the Interested Party in total disregard to public concerns and public participation.

16. The court notes that on the most contentious issue that relates to the decision deemed to have been made by the Respondent, the deponent relies on information from others and that the affidavit is devoid of the source or the identity or the identities of the persons who provided the “convincing information”. There is also no affidavit evidence from these people and if the Deponent were to testify or to be subjected to cross-examination such convincing information would be treated as hearsay.

17. This court is of the view that the law of evidence restricts the use of such evidence that is based on information and belief particularly in weighty and serious applications such as this instance one that seeks for stay. In short that is to say that hearsay evidence is of no weighty value particularly where it has short comings as to the identity of the source.

18. **Section 59(1)** of the **County Governments Act** confers the County Service Board with powers to advertise, shortlist, interview and then nominate candidates for vetting by the County Assembly. At the vetting stage the County Assembly is mandated to invite the members of the public to participate in the process of vetting the candidate.

19. **Section 77(2)** of the **County Governments Act** envisages a situation whereby the first port of call for any aggrieved person would be to raise an objection at every given stage provided, to the County Service Board against any decision arrived at during the recruitment exercise.

20. A copy of the newspaper extract of the shortlisted prospective candidates is annexed to the Petitioner's Petition but this court notes that both the application and the Petition are devoid of annexures in support of objections raised by the Petitioner and or any member of the public and therefore from the averments tendered into court it would appear that no objection has been voiced or tendered to the Board against the short-listing of the Interested Party.

21. From the submissions made this court poses the question as to whether a decision to nominate or appoint has been made. This is best answered by the Applicant's use of the words ;

“Intends to.....”

“Is in the process....”

22. By using the aforementioned words this court is of the view that no decision has yet been arrived at and that the process is still ongoing.

23. This court reiterates that it is evident that the Applicant has not followed the set down process for redress as provided by the law and it is also evident that the recruitment exercise is still ongoing and that the Applicant's right to publicly participate in the recruitment exercise is found to be still intact.

24. There is a lot of case law on due process and this court is guided by the Court of Appeal case of **Speaker of The National Assembly V. The Hon. James Njenga Karume C.App. No. NAI. 92 of 1992** where Kwach, Cockar and Muli JJ.A stated;

‘that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.....’

20. The above case speaks for itself that the procedure prescribed must be strictly followed.

21. This court is satisfied that the Preliminary Objection raised by the Respondents and the Interested Party touches on a point of law and that can determine and dispose of the matter. Refer to the case of **Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd.** [1969] EA 696.

FINDINGS AND DETERMINATION

22. This court finds that the Applicant/Petitioner has failed to follow due process and that the Application and Petition are found to be premature.

23. The Preliminary Objection is hereby upheld.

24. The Petition is found to be incompetent and is hereby struck out.

25. The Petition is found to be of public interest (PIL) and therefore there shall be no order as to costs. Each party shall bear its/their own costs.

It is so ordered.

Dated, Signed and Delivered this 7th day of October, 2014.

A. MSHILA

JUDGE