



**Otieno & another v Governor, County Government of Homa-Bay & another
(Petition E003 of 2023) [2024] KEELRC 1709 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1709 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E003 OF 2023**

CN BAARI, J

JULY 4, 2024

BETWEEN

MICHAEL KOJO OTIENO 1ST PETITIONER

EVANCE OTIENO OLOO 2ND PETITIONER

AND

THE GOVERNOR, COUNTY GOVERNMENT OF HOMA-BAY 1ST RESPONDENT

COUNTY ASSEMBLY OF HOMA-BAY 2ND RESPONDENT

JUDGMENT

1. This ruling relates to the Petitioners' petition dated 25th January, 2023, wherein, they seek the following reliefs:
 - i. A declaration that the press release dated 16th January, 2023 by the office of the governor is unconstitutional and therefore invalid, null and void.
 - ii. A declaration that the advert dated 19th January, 2023 by the Nation issued by the 2nd Respondent is unconstitutional and therefore invalid, null and void.
 - iii. An order of Certiorari to remove into this court for purposes of being quashed and to quash the press release dated 16th January, 2023 and the advert dated 19th January, 2023 issued by the 2nd Respondent.
 - iv. Costs of the suit.
2. Parties sought to canvass the petition through written submissions. Both parties filed submissions.



The Petition

3. The Petitioners state that the 1st Respondent announced vacancies on 6th September 2022 and 4th October, 2022 inviting candidates to fill the positions of member of County Public Service Board. It is their case that a press release issued on 16th January, 2023, on the vetting of applicants violates the county government Act.
4. The Petitioners further state that the at the time the vacancies in question were cleared, the 2nd Respondent was not in operation as the members were sworn into office on 21st September, 2022.
5. It is the Petitioners assertion that the 1st Respondents did not comply with section 58(1) of the County Government Act based on the dates when the vacancies were declared.
6. The Petitioners aver that no advert was made inviting members of the public for vetting and hearing on the suitability of the selection panel per Sections 4, 5, 6, 7, 8, 9 and 10 of the [Public Appointments \(County assemblies Approval\) Act](#).
7. That public participation is engendered as part of the approval process by the county assembly and its relevant committees.
8. That the governor did not appoint and the county assembly did not approve the members of the selection panel as anchored in Section 58 (1) of the County Government Act.
9. The Petitioners states that the opaque manner of the approvals violate Articles 10 (2)(c), 35(3), 47(1), and 232(i)(f). They further aver that the Respondents' failure to provide transparency, accountability and public participation violated Articles 10, 47 and 232 of [the Constitution](#).
10. It is their case that the Respondents' action violated their legitimate expectation under the law that the 1st Respondent would execute its mandate strictly in accordance with the law.

The Respondents' Reply

11. The Respondents in an affidavit sworn by one Prof. Benard Muok on 13th February, 2023, states THAT:
 - i. That in view of the provisions of Article 234(2)(i) of [the Constitution](#), Section 77 of the County Government Act and Section 87 (2) of the [Public Service Commission Act](#), this court's jurisdiction to hear and determine the present proceedings in the first instance is differed to the extent that the petition is a challenge to a recruitment of persons to serve in the county Public Service.
 - ii. The proceedings offend the doctrine of exhaustion contemplated under Article 159(2)(c) of [the Constitution](#), since there exists an alternative dispute resolution forum and alternative remedies, including an investigative process by the County Public Service Board under Section 59(4)(f) and 75.
 - iii. Qualification for membership of the County Public Service Board is prescribed under Section 58 (3) of the County Government Act and the procedure for nomination and appointment of members is provided for under Section 58 of the same law.
 - iv. The power to appoint members of the CPSB is bestowed on the County Governor by statute and in exercising that power, duty and function, the 1st Respondent has not violated any law since there arose vacancies in the CPSB. They aver that the vacancies in question existed before the current governor came into office.



- v. They confirm that the vacancies subject of the petition were advertised on 6th September, 2022 and that no wrong was committed in so doing as the advert was for public information only.
- vi. The Respondents states that the 1st Respondent nominated persons for approval as a selection panel, and who were formally appointed upon approval on 28th September, 2022. It is their case that adverts for the vacant positions were again sent out on 4th October, 2023
- vii. It is the selection panel that recruited the members of the CPSB contrary to the Petitioners allegations. That the Respondents complied with the law in making the nominations, approval and appointments to the select panel, and time lines were adhered to.
- viii. That the Petitioners wrote to the Clerk of the 2nd Respondent on the issue of the selection panel, and that the Clerk shared a report of the appointment with them and hence, they were aware even at the time of filing this petition that the County Assembly had approved the governor's nominees to the selection panel.
- ix. That the public was informed of the appointment and approval of the panel and that the press release constituted lawful communication to the public and was demonstration that the process was open to the public.
- x. The proceedings/petition seeks to stop a process which has already concluded, hence the orders sought cannot issue. They aver that the selection panel finished its work and now stands dissolved hence no longer in operation.
- xi. That no breach of statutory provisions set out in the petition has been shown.
- xii. That the Petitioners have not at all shown that there was a violation of their rights and fundamental freedoms or those of other persons.

The Petitioners' Submissions

- 12. The Petitioners reiterates that they have locus standi under Article 22 and 258 of *the Constitution* by reason that public interest cases encompass more than just the parties to the suit, and as such, suits are meant to benefit the wider public and not the individual directly involved. They had reliance in *Kiluwa Limited & Another v Commissioner of Lands & 3 others* [2015] eKLR, where the court held, thus:

“ 23 Section 60 of the repealed Constitution of Kenya, has effectively been replaced by Article 159(d) of *the Constitution* of the Second Republic, which expressly mandates the court to do justice to all without regard to either status or procedural technicalities.”
- 13. The Petitioners submit that Public Service Commission (PSC) does not have jurisdiction to determine disputes regarding the interpretation and application of *the Constitution* and/or to issue remedies for the violation of *the Constitution* and statutes in appointments of public/state officers.
- 14. The Petitioners further submit that the Court should assert its judicial authority to protect *the Constitution* and the law from being violated by the actions of the Respondents. They sought to rely in *Cohens v Virginia* 19 U. S. 264 (1821) to buttress this position.
- 15. The Petitioners submit that the bulk of the reliefs sought in the instant petition, require the authoritative interpretation of *the Constitution*, which is not within the mandate of Public Service Commission or subordinate courts.



16. It is their submission that in respect of the case, the purposeful, value and principle-based interpretation required by Article 259 and 159(2)e would be the one that protects the principles of transparency, competitive and merit based recruitments, participation of the people, rule of law, good governance and inclusiveness set out in Article 10.
17. The Petitioners submit that this Court has to take into consideration the values and principles of public service set out in Article 232 as well as the Bill of Rights, especially Articles 27, 41 (1), 46 and 47(1) of *the Constitution* as read with Public Appointment (County Assemblies Approval) Act as read with Section 42 of the Homa-Bay County Assembly Standing Orders.
18. The Petitioners submit that from the foregoing provisions of *the Constitution*, the 2nd Respondent did not comply with the law hence their actions amounted to impunity.

The Respondents' Submissions

19. It is the Respondents' submission that this Court lacks the requisite jurisdiction to entertain this Petition in the first instance, on the basis that the Petitioners have failed to exhaust all dispute resolution mechanisms by way of preferring an appeal to the Public Service Commission contrary to Section 77 of the *County Governments Act*.
20. That the petition offends the doctrine of exhaustion contemplated under Article 159(2)(c) of *the Constitution*, since there exists alternative dispute resolution forums, and alternative remedies, including investigative process by the County Public Service Board under Section 59(4)(1) and 75 of the *County Governments Act*. They placed reliance in Owners of the Motor Vessel Lillian S v Caltex Oil Kenya Limited [1989] eKLR to support this position.
21. It is their submission that the Petition before Court is premature and akin to putting the cart before the horse and ought to struck out with costs as the first port of call for the Petitioners should have been to lodge an Appeal before the Public Service Commission. They sought to rely in the Court of Appeal decision in Secretary County Public Service Board and Another v Hulbhai Gedi Abdille (2017) eKLR to buttress this position.
22. They submit that the decision of the Court of Appeal in Secretary, County Public Service Board and Another v Hulbhai Gedi Abdille (2017) eKLR is binding on this Court and the Court should not depart from it.
23. It is the Respondents' submission that the Petitioners have failed to prove their case on a balance of probabilities. They submit further that the claims made by the Petitioners in this regard are mere allegations and the claims therein are unsubstantiated.
24. It is their assertion that all the allegations made by the Petitioners regarding the process in appointment of the members to the County Public Service Board were rebutted by the sworn Affidavit of Prof. Ben Muok who is the County Secretary of the 2nd Respondent herein.
25. They submit that the burden of proof always lies with he who alleges and therefore in this case, the burden of proof lay with the Petitioners to prove that the Respondents did not follow the due process in the nomination and appointment of members to the County Public Service Board.
26. It is the Respondents submission that the Petitioners solely relied on Affidavits sworn by the Petitioners themselves supporting both their application and the Petition, and whose contents have been duly rebutted by the Affidavit of Prof. Ben Muok, who is the County Secretary of the 2nd Respondent.



27. It is the Respondents' position that from the sworn affidavit by the County Secretary of the 2nd Respondent, it is clearly laid out that due process in the nomination and appointment of the Members to the County Public Service Board, whose appointment has been laid to scrutiny by the Petitioners was followed in line with the relevant laws.
28. They aver that the Members of the County Public Service Board whose Appointment is being challenged by the Petitioners were legally appointed by the County Governor of Homabay, after being competitively sourced and through a selection panel which the Governor appointed in accordance with the law.
29. It is their submission that public participation in approving the appointments was undertaken by the County Assembly of Homabay, as advertisements were placed and press releases made, as acknowledged by the Petitioners in their pleadings.
30. It is the Respondents' submission that the Orders sought by the Petitioners should fail due to the fact that the Petitioners failed to join to these proceedings parties who will be affected in the unlikely event that this Honorable Court grants the Petitioners the Orders they are seeking.
31. It is their further submission that the orders of injunction as sought, cannot issue to stop occurrence of an event which has already taken place. That the prayers sought have all been overtaken by events and the Petitioners are aware of these facts, but have deliberately chosen to mislead the court and to conceal material particulars which are relevant to the cause they seek to advance before the court.
32. It is submitted that the Petitioners have merely recited constitutional provisions and principles in their Petition, and that they have not shown clearly through evidence the way and manner in which any of the Respondents have contravened, infringed or violated the cited constitutional provisions in relation to the petitioners and or to any other person. Reliance was had to the case of Mumo Matemo -vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR.
33. It is the Respondents' prayer that the Petitioners' suit be dismissed with costs.

Analysis and Determination

34. I have considered the petition, the reply and the parties' submissions. The issues that fall for determination are:
 - i. Whether this Court has jurisdiction to determine this petition.
 - ii. Whether the Petitioners deserve the reliefs sought

Whether this Court has the jurisdiction to determine this Petition**

35. Nyarangi J in Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited [1989] eKLR, had this to say on jurisdiction: -

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."



36. The Respondents' position is that this court's jurisdiction to hear and determine this petition in the first instance is differed to the extent that the petition is a challenge to a recruitment of persons to serve in the County Public Service.
37. Section 87(2) of the [Public Service Commission Act](#) states: -
- “(2) A person shall not file any legal proceedings in any court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government service unless the procedure provided under this Part has been exhausted.”
38. In [Lukale Moses Sande v the County Government of Kakamega & 3 Others Cause No. 23 of 2020](#), the Court had this to say on exhaustion of internal mechanisms: -
- “The Claimant did not exhaust the appeal procedures in respect to his removal, purported removal and or terms and conditions of service as contemplated by [the Constitution](#), the County Government Act and the [Public Service Commission Act](#), before moving this court, and the court therefore declines jurisdiction.”
39. The question then is whether issues touching on the appointment of members of the County Public Service Board, fall within the appellate mandate of the Public Service Commission.
40. Section 77 of the County Government Act states thus: -
- “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 county public officer may appeal to the Public Service Commission (in this Part referred to as the “Commission”) against the decision.”
41. A reading of this provision intimates that it is the decisions of the CPSB that are the subject of appeals to the PSC, and it would in my view, be absurd to construe the appointment of the Board itself to fall under the same appellate mandate of the Public Service Commission.
42. It then follows that the court's jurisdiction is not ousted by virtue of the doctrine of exhaustion as alleged. I therefore find and hold that this court has jurisdiction to determine the instant petition.

Whether the Petitioners deserve the reliefs sought

43. The Petitioners' contention is that the 1st Respondent announced vacancies on 6th September 2022 and 4th October, 2022 inviting candidates to fill the positions of member of County Public Service Board. They further aver that a press release issued on 16th January, 2023 on the vetting of applicants, violates the county government Act on the basis that there was no selection panel in place at the time the advertisement was posted.
44. The Respondents on their part, argued that the appointment of the CPSB followed an advertisement for the positions and a competitive recruitment process and nominations which were eventually approved by the County Assembly of Homabay after a vetting process which incorporated public participation as contemplated by the [Public Appointments \(County Assemblies Approval\) Act](#).
45. It is their further argument that the allegation that there was no selection panel and/or approval of such a panel that preceded appointments to the County Public Service Board, is plainly false and an attempt to mislead this court.



46. For starters, it is not very clear to this court whether what the Petitioners challenge is the appointment of the selection panel or the appointment of the CPSB.
47. The first advertisement for the position of CPSB members was published on 6th September, 2022, which was a time parties agree that there was no county assembly in place having been sworn in later in the same month.
48. A further advertisement placed by the 1st Respondent on the same positions, was again published on 4th October, 2022. By their latter advert, the Respondents seem to have realized that they had put the cart before the horse, but realized the error and worked to correct it vide this subsequent advertisement.
49. It is also evident from the record, that the Respondents put in place a selection panel that was charged with the recruitment of the CPSB of Homabay County, and which panel was approved by the 2nd Respondent in a meeting held on 28th September, 2022.
50. The record further supports the Respondents' assertion that the CPSB members were appointed by the county governor upon approval by the 2nd Respondent.
51. The Court further notes the persons that would be affected by any adverse orders were not joined to this suit and if the court were to grant the orders sought, the same would amount to condemning them unheard.
52. In the end, I find and hold that the Petitioners have not led sufficient evidence to support allegations of violation of their rights and fundamental freedoms or those of other residents of Homabay County.
53. The petition is thus devoid of merit and is for dismissal. It is dismissed with no orders on costs being a public interest litigation.

Judgment of the court.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 4TH DAY OF JULY, 2024.

C. N. BAARI

JUDGE

Appearance:

N/A for the Petitioners

Ms. Achieng for the Respondents

Ms. Anjeline & Debra- C/As

