



**Onsomu v County Government of Nyamira & another (Petition  
E012 of 2024) [2024] KEELRC 2214 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2214 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E012 OF 2024  
CN BAARI, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**GILBERT ATEI ONSOMU ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF NYAMIRA ..... 1<sup>ST</sup> RESPONDENT**

**GOVERNOR, COUNTY GOVERNMENT OF NYAMIRA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Before Court for determination is the Petitioner's petition dated 27<sup>th</sup> March, 2024 and the Respondents' Preliminary Objection dated 18<sup>th</sup> April, 2024.
2. Under the petition, the Petitioner seeks the following reliefs: -
  - a. A Declaration that the recruitment based on the advertisement by the 4<sup>th</sup> Respondent dated dated 9<sup>th</sup> March, 2023, October, 2023 and 14<sup>th</sup> December, 2023, contravenes the Public Finance Management Act, County Governments Act and the Constitution and therefore are unconstitutional, unprocedural and illegal.
  - b. A declaration that the recruitment of personnel without provision in the budget and without approval of the County Assembly by the Respondents violates the constitution and the law.
  - c. A declaration that the Respondents have violated Articles 27(1), (2), (4), (5), 28, 41, 47(1) (2), 50(1), 201, 212, 227, 232, 236(b) of the Constitution.
  - d. A declaration that recruitment of persons who were not shortlisted, relatives of Respondents and members of Respondents, removal of certain employees from the payroll and recruitment to positions not vacant, but occupied by other employees is illegal, discriminatory and violates the Constitution and laws relating to employment.



- e. A conservatory order staying any further recruitment of personnel to the Respondent by the 4<sup>th</sup> Respondent pursuant to the advertisement by the 4<sup>th</sup> Respondent dated 9<sup>th</sup> March 2023, October, 2023 and 14<sup>th</sup> December, 2023.
  - f. A conservatory order stopping any payment of wages and salaries together with the accompanying allowances and any payments already paid be refunded to the government for having been paid illegally and unlawfully contrary to the [Public Finance Management Act](#) and [the Constitution](#).
  - g. A declaration that the 2<sup>nd</sup> Respondent has violated [the Constitution](#) and hence unfit to hold public office by presiding over actions that violate [the constitution](#).
  - h. The costs of the petition be borne by the Respondents.
3. The petition is premised on the following grounds:
- a. That the Wage bill in the County Government of Nyamira is increasingly reducing funding for development programs as per reports by the Controller of Budget and the Auditor general.
  - b. That since the Governor assumed office in January. 2021, he embarked on unregulated recruitment and he has been circumventing the law to recruit staff without approved budgets and staff establishment
  - c. That the County public service Board even when it was within their knowledge that the wage bill is beyond the legal ceiling of 35% of the total revenue, it declared a total of 358 vacancies on 9<sup>th</sup> March 2023, in which the County is expected to spend a total of 275million annually, an amount which was not provided for in the 2023/2024 approved budget estimates.
  - d. That in another advertisement dated October, 2023, the County Public Service Board declared 39 positions as being vacant, which recruitment is expected to cost the county government an annual wage bill of approximately Ksh. 28 Million
  - e. That in a third advertisement dated 14<sup>th</sup> December 2023, the County Public Service Board once more declared a total of eight (8) positions which is expected to cost the county government a total of over Ksh. 5Million.
  - f. That the declaration of the vacancies dated 9<sup>th</sup> March, 2023 was not informed by the appropriated budget estimates for the period 2023/24 Financial year, and the approved staff establishment.
  - g. That consequently, and resulting from the advertisement, the County Government of Nyamira recruited a number of staff in which several appointments have been made without requisite budget provisions as required by [the Constitution](#), the [Public Finance Management Act](#) 2012, the County Government Act 2012 and other enabling legislation.
  - h. It is further alleged that the Respondents have expunged over 300 officers from the payroll in the existing staff establishment without reasonable and lawful grounds to accommodate the newly recruited staff arising from the advertisements dated 9<sup>th</sup> March, 2023, October, 2023 and 14<sup>th</sup> December, 2023.
  - i. That the Respondents' action is an affront to the fundamental rights and freedoms provided in chapter four of [the Constitution](#) and further violation of Article 41, 47 and their right of legitimate expectation.



5. The Respondents opposed the petition vide a Replying affidavit sworn by one Jack Magara on 16<sup>th</sup> April, 2024 and a notice of preliminary objection of 18<sup>th</sup> April, 2024.
6. Under the Replying affidavit, the Respondents' state:
  - i. That the instant proceedings contravene the principle of res judicata as the same are predicated on and raise issues and questions that have already been conclusively addressed and ruled on by this Honourable Court in its judgment, vide Kisumu Elrc Petition No.: 3 Of 2023 (Vincent Mariita Omao Vs. County Government Of Nyamira & 4 Others).
  - ii. That the recruitment exercises and public adverts which the Petitioner purports to be aggrieved of herein, were done in 2023, with the first recruitment exercise commencing in March, 2023.
  - iii. That the recruitment and hiring exercises in question herein have long been completed and the advertised positions competitively filled
  - iv. That the said recruitment and hiring exercises were matters which were publicly advertised and competitively applied for by all sections of the public
  - v. That there are therefore no further pending recruitment and advert exercises that would warrant any conservatory orders of stay as pleaded and sought by the petitioner;
  - vi. That there is no Article in *the Constitution* of Kenya, 2010 that absolutely dictates the issue of wage bill proportion ceiling and which dictates that any procedurally hired public servants whose wages go beyond the said wage bill proposed ceiling are unconstitutionally in employment and should be summarily fired.
  - vii. That the provision for the wage bill proportion ceiling of 35% as set and flexibly regulated under Regulation 25(1)(a-b) of the Public Finance Management (County Governments) Regulations, 2015, is a matter without constitutional force and which is not determinant of the constitutionality or unconstitutionality of the employment and remuneration of any public employee
  - viii. That the Respondents on 25.01.2023 passed a resolution, vide County Executive Committee minute no. 5(i)/25/01/2023, that only the most critical staff would be recruited in line with a memo presented by the respective County Executive Committee Member for Public Service Management
  - ix. That the critical staff as communicated by the County Executive Committee Member for Public Service Management in his memo to the County Executive Committee were duly requisitioned by respective departments to fill gaps and to hire staff most critically needed by the departments in strict compliance with the County organizational structure
  - x. That the Respondents after analyzing the financial and budgetary implications of the requested critical new recruitments, expressly confirmed that there indeed was budgetary allocation to effect the Cabinet resolution on recruitment of new critical staff and reorganization of the County Executive
  - xi. That it is clear and demonstrable from the foregoing that the recruitments that the Petitioner purports to be aggrieved with herein were preceded by due prior diligence and confirmation of availability of budgetary allocation.
  - xii. That the issues raised by the Petitioner herein were indeed comprehensively and satisfactorily addressed by the 2<sup>nd</sup> Respondent in a letter to the 2<sup>nd</sup> Interested Party.



- xiii. That the Petitioner's assertions that the County Assembly had frozen all recruitment of new staff are not only baseless and non-factual, but also ignorant of the basic workings of the County Government.
7. Under the Preliminary Objection, the Respondents raised the following issues: -
- a. That the petition contravenes the principle of res judicata as the same is predicated on and raises issues and questions that have already been conclusively addressed and ruled on by this Honourable Court.
  - b. That the petition besides listing numerous Articles of *the Constitution*, does not at any point plead any particulars of violation of any single constitutional provision.
  - c. That the petition has not at any point pleaded the manner in which and how any particular constitutional provision has been violated by any of the Respondents.
  - d. That the petition is premised on allegations of statutory and regulatory violations which do not have any degree of constitutional violation.
  - e. That the petition makes numerous prejudicial and scandalous allegations against persons and individuals who have not been made parties to the instant proceedings.
8. Parties canvassed both the petition and the preliminary objection through written submissions.

### **The Petitioner's Submissions**

8. It is submitted for the Petitioner that the Court in the previous matter did not hear the case on its merits, but instead dismissed the Petitioner's case on the basis that it did not meet the strict threshold set in the Anarita Karimi Njeru case on account of the Petitioner failing to prove with precision his allegations of Constitutional violation. The Petitioner submits further that the substantive issues raised in the Petition Kisumu ELRCPetiti *On No.3 Of 2023* were not substantively addressed.
9. The Petitioner submits that the matter previously before this court raised different issues between different parties, which conclusively points to the fact that the claim by the Respondents that the instant petition is res judicata should fail.
10. It is submitted that the instant petition has cited with precision complaints regarding the violations of Articles 27(1), (2), (4),(5), 28, 41, 47(1)"(2) , 50(1) 201, 212, 227, 232, 236(b) of *the Constitution*. That Paragraphs 1.0 to 2.29, of the petition have gone into great detail enumerating the particulars of the violations of *the constitution* and established the factual basis of the complaints against the Respondents over various violations of *the Constitution* and the manner in which the said provisions have been violated.
11. He submits that the petition has satisfied the threshold of specificity as espoused in the celebrated cases of Anarita Karimi Njeru v Republic (No.) [1979] 1 KLR 154 and Mumo Matemu v Trusted Society of Human Rights Alliance, Civil Appeal No.290 of 2012 [2013] eKLR
12. The Petitioner submits that in a Report of the Auditor General for Nyamira County for the year ended 30<sup>th</sup> June 2022, it was observed that the payments on compensation of employees of Kshs. 2,958,585,401 constituted 57% of the total revenue of Kshs. 5,177,250,253 collected during the year under review. This is 22% above the limit set under the Act and regulations as hereabove shown.
13. It is submitted that the public interest and constitutional values canvassed in the petition leans in favour of this Honourable Court granting the conservatory orders sought as against the Respondents herein.



14. The Petitioner prays that based on the unprocedural nature of the Respondents' actions the orders as sought in the petition dated 27<sup>th</sup> March 2024 be granted as sought

### **The Respondents' Submissions**

15. It is submitted for the Respondents that the instant petition discloses no actionable constitutional violation or other valid constitutional issues warranting judicial intervention.
16. They submit that the petition is res judicata in as far as it canvasses the recruitment commenced vide the advertisement of 09.03.2024 and whether there was prior budgetary provision and allocation for the recruitment and which are the issues in the previous petition.
17. It is their submission that the recruitments the Petitioner purports to be aggrieved with were preceded by due prior diligence and confirmation of availability of budgetary allocation and which is a fact conclusively confirmed by substantial evidence on record.
18. The Respondents further submit that the critical staff as communicated by the County Executive Committee Member for Public Service Management in his memo to the County Executive Committee, were duly requisitioned by respective departments to fill gaps and to hire staff most critically needed by the departments in strict line with the County organizational structure.
19. They submit that Petitioner's assertion that the County Assembly had frozen all recruitment of new personnel are not only baseless and non-factual, but also ignorant of basic workings of the County Government.
20. It is their prayer that the petition herein be dismissed with costs.

### **Analysis and Determination**

21. Upon careful consideration of the petition, the replying affidavit, the Preliminary Objection and the submissions by both parties, the following issues arise for determination: -
  - i. Whether the petition is res judicata and if not;
  - ii. Whether the petition has merit;
  - iii. Whose costs?

### **Whether the petition is res judicata**

22. It is now settled that for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied: -
  - a. The suit or issue was directly and substantially in issue in the former suit.
  - b. That former suit was between the same parties or parties under whom they or any of them claim.
  - c. Those parties were litigating under the same title.
  - d. The issue was heard and finally determined in the former suit.
  - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.



23. The instant petition like the previous one, concerns the advertisement of a total of 358 vacancies on the 9<sup>th</sup> March, 2023, 39 vacancies in October, 2023 and 8 vacancies on 14<sup>th</sup> December, 2023, which recruitment the Petitioner alleges was illegal and against the provisions of the Public Management Act and its attendant Regulations, on the premise that the Respondents proceeded to advertise and recruit without an approved budget.

24. In Kisumu ELRC Petition *No.3 of 2023* between Vincent Marita Omao v County Government of Nyamira & 4 others, this Court while dismissing the petition, made the following pronouncements:

“The documents produced in evidence by the Petitioner indicates that the Respondents had a budget for recurrent expenditure; specifically, compensation to employees for each of the departments that was recruiting, as well as a separate budget for development. The Petitioner has therefore not shown that the money budgeted for development is the same money the Respondents intended to use for recurrent expenditure.

Further, the Petitioner has not shown what the salary entitlement for each of the newly recruited employees is, so as to prove that their recruitment and subsequent appointment will exceed the budget set for recurrent expenditure.

Other than making sweeping statements, the Petitioner has in my view, not set out the specific Constitutional provisions which he believes have been violated or threatened, and the manner in which the Respondents have violated those provisions.

Having advertised the positions in a newspaper with nationwide circulation, it is not clear how else the Respondents would have made the recruitment more competitive. The Petitioner also did not prove how an open advertisement for jobs would discriminate against any member of the public or how some segment of the public will have an undue advantage.

In *Sella Rose Anyango v Attorney General and 2 Others* [2021] eKLR the Court held: -

‘The case of *Anarita Karimi Njeru* (supra) has been relied upon from time and time again to demonstrate the threshold of a successful Constitutional Petition. It should be appreciated the requirements for a successful Constitutional Petition are simple and are thus; the Petitioner should set out the Constitutional provisions, which he believes have been violated or threatened, and the manner in which the Respondent(s) have violated those provisions. It is not enough for the Petitioner to just list the Constitutional provisions without demonstrating how they were infringed upon.’

In my view, the petition does not meet the strict threshold set in *Anarita Karimi Njeru* case (supra) on account of the Petitioner failing to prove with precision his allegations of Constitutional violations.

The petition is devoid of merit and is hereby dismissed with no orders as to costs.”

26. It is by virtue of the decision foregone that the Respondents argue that the instant petition is res judicata. Section 7 of the *Civil Procedure Act*, 2010 states thus: -

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of the claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”



27. The instant petition in a nutshell concerns declaration of a total of 358 vacancies on the 9<sup>th</sup> March, 2023, 39 vacancies in October 2023 and 8 in December of the same year, the expunging of over 300 officers from the payroll, statutory budget ceilings vis-a-vis limit on the county government's expenditure on wages and availability of budgetary expenditure in respect of the recruited employees.
28. A glance at the issues subject of Petition No.3 of 2023 between Vincent Marita Omasi v County Government of Nyamira & 4 others, clearly shows that the petition concerned similar issues as those raised in the instant petition. Further, vide the judgment rendered in the earlier petition and which is highlighted above, the Court dismissed the petition for amongst others failure to meet the threshold set under the Anarita Karimi Njeru case.
29. It is also noteworthy that the Court in the same judgment did pronounce itself on the budget and the wage bill issues raised by the Petitioner therein, which in my view, is confirmation that having stated as much in that judgment, leaves nothing for this court to determine under this petition without running the risk of the court contradicting itself. This thus confirms that indeed the instant petition is res judicata.
30. In the premise, I find the Petitioner's petition dated 27<sup>th</sup> March, 2024 res judicata and is hereby struck out in its entirety.
31. The petition having been brought under public litigation, I order that parties bear their own costs of the suit.
32. Judgment of the Court.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 19TH DAY OF SEPTEMBER, 2024.**

**C. N. BAARI**

**JUDGE**

Appearance:

Mr. Ojuro h/b for Mr. Yogo for the Petitioner

Mr. Marongo present for the Respondents

Ms. Anjeline - CA

