

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KITALE**

**PETITION NO. E002 OF 2025**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 27, 41, 50, 162, 232, 258 & 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION OF ARTICLES 10(2)(b), 20, 21, 22, 27(1)(2)(3)(4) & (5), 28, 41(1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE NATIONAL VALUES AND PRINCIPLES OF PUBLIC SERVICE UNDER ARTICLE 232(1) & (2) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTIONS 55, 59, 59A, 65, 66, 67 & 68A OF THE COUNTY GOVERNMENTS ACT CAP 265 AND SECTION 5 OF THE EMPLOYMENT ACT NO. 11 OF 2007**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA  
(PROTECTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**ANDREW KHATECHI KILUI ..... 1<sup>ST</sup>  
PETITIONER**

**DANCAN OCHODO ..... 2<sup>ND</sup>  
PETITIONER**

**HOSEA KIPLAGAT KIPTOO ..... 3<sup>RD</sup>  
PETITIONER**

**MERCY JEPKOSGEI ROTICH ..... 4<sup>TH</sup> PETITIONER**

**BRIAN KIPLAGAT ..... 5<sup>TH</sup> PETITIONER**

**EMIERIZU DENNIS EMIERIZU ..... 6<sup>TH</sup> PETITIONER**

**ERIC KHISA ..... 7<sup>TH</sup> PETITIONER**

**VERSUS**

**TRANS NZOIA**

**COUNTY PUBLIC SERVICE BOARD ..... 1<sup>ST</sup>  
RESPONDENT**

**COUNTY GOVERNMENT OF**

**TRANS NZOIA ..... 2<sup>ND</sup>  
RESPONDENT**

**RULING**

1. The Petitioners herein aver that they are public spirited residents of Trans Nzoia County, that they applied for employment following advertisement of several jobs by the 1<sup>st</sup> Respondent, a body corporate established pursuant to

section 59(a) of the County Government Act and charged with the mandate inter alia, of appointing persons to offices within the 2<sup>nd</sup> Respondent's County Public Service. That the 2<sup>nd</sup> Respondent is one of the 47 counties exercising constitutional authority established under article 176 of the Constitution of Kenya 2010 and section 6 of the County Government Act.

2. The Petitioners filed the instant Petition dated 27<sup>th</sup> March 2025 against the Respondents invoking various Articles of the Constitution specifically Articles 10, 22, 23, 47, 73, 75, 232 and 235 and relevant provisions of the County Governments Act seeking the following reliefs:-
  - a. A declaration that all the appointments undertaken by the 1<sup>st</sup> Respondent pursuant to the advertisement dated 19<sup>th</sup> October 2024 are illegal, null and void
  - b. An order of permanent order of injunction do issue restraining the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent by themselves agents/and or servants from employing and/or paying out of the 2<sup>nd</sup> Respondents public funds any remuneration and/or emoluments to any of the

persons recruited pursuant to the advertisement dated 19<sup>th</sup> October 2024

- c. That a mandatory order of injunction do issue compelling the 1<sup>st</sup> Respondent to undertake a fresh recruitment exercise with regard to the aforesaid 2<sup>nd</sup> Respondent staff requirements with full adherence to the Constitution and all applicable laws
- d. That costs of this Petition be borne by the Respondents herein
- e. Such other orders as this honourable court shall deem fit and just

3. The Petitioners contemporaneously filed a Notice of Motion seeking several interim and conservatory orders, specifically:

- a. Spent
- b. That ex parte orders do issue in (c) below
- c. That pending the hearing and determination of this application inter partes this Honourable Court be pleased to issue temporary conservatory orders restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from issuing any employment letters and/or employing and/or commencing or continuing any employment

procedures arising from the advertisement dated the 19<sup>th</sup> October 2024 and the subsequent interviews conducted between the 14<sup>th</sup> January 2025 and 3<sup>rd</sup> February 2025

d. That upon hearing inter partes, this Honourable Court be pleased to grant the prayers as sought in (c) above pending the hearing and determination of this Petition.

e. That the costs of the application be provided for.

4. The Notice of Motion is founded on the grounds set out at the foot of the application and in the supporting affidavits of the Petitioners, and specifically that: -

i. That on the 19<sup>th</sup> October 2024, the 1<sup>st</sup> Respondent acting for and on behalf of the 2<sup>nd</sup> Respondent posted an advertisement in its website inviting applications to fill up various employment opportunities within Trans- Nzoia County Public Service.

ii. That the Petitioners applied and were duly shortlisted for interviews conducted between the 14<sup>th</sup> January 2025 to the 3<sup>rd</sup> February 2025

- iii. That thereafter the 1<sup>st</sup> Respondent purported to come up with a list of persons it intended to be employed to various positions within the Trans-Nzoia County Public Service.
- iv. That the recruitment and purported appointment process was so riddled with serious Constitutional infractions and other nefarious malpractices that it cannot stand the rigors of any test in law
- v. That the 1<sup>st</sup> Respondent purported to appoint persons who were not shortlisted for interview in brazen violation of Article 232(g) of the Constitution of Kenya 2010, requiring appointments to be based on fair competition and merit.
- vi. That the 1<sup>st</sup> Respondent in the exercise of its mandate is required in mandatory terms by Section 59A of the County Governments Act, Cap 265 to adhere to the Constitution of Kenya 2010, to Cap 265 and to any other written law.
- vii. That in exercising its mandate complained of herein, the 1<sup>st</sup> Respondent did not adhere to the matters it ought to have taken into account as prescribed by

Section 65(1)(a), (b), (c), (d), (e, )(f) & (g) of Cap 265 and therefore all that it did is illegal, null and void.

- viii. That the 1<sup>st</sup> Respondent advertised for one (1) position and yet purported to appoint 8 persons to the advertised position in stark violation of Article 10(2)(b), (c) of the Constitution of Kenya, 2010
- ix. That in some instances, the 1<sup>st</sup> Respondent advertised for 10 positions but ended up recruiting 14 persons for appointment to the said positions.
- x. That in other instances, the 1<sup>st</sup> Respondent in total disregard of the gender principle purported to appoint either all males or all females to some positions in totally unexplained and unwarranted circumstances.
- xi. That the entire purported recruitment process is tainted with lack of transparency and accountability in contravention of Article 10 of the Constitution of Kenya
- xii. That the entire purported recruitment process is so tainted and in total contravention of the values and

principles of public service as mandatorily prescribed by Article 232 of the Constitution of Kenya, 2010.

- xiii. That the values and principles of public service are binding on both levels of government.
- xiv. That the persons so appointed in the purported manner may be issued with appointment letters at any time from now.
- xv. That once issued with appointment letters, the 2<sup>nd</sup> Respondent will be obligated to remunerate the persons so employed in the impugned manner complained of from public funds.
- xvi. That once issued with such appointment letters such persons appointed in the manner complained of in the event of any separation, may file claims against the 2<sup>nd</sup> Respondent and hence the 2<sup>nd</sup> Respondent may end up unnecessarily footing huge claims.
- xvii. That therefore it is in the public interest that the impugned employment process be suspended pending the hearing and determination of the application filed herewith and subsequently, the Petition.

- xviii. That the issues raised in Petition and the application raise triable issues of public interest with a high chance of success, and if the orders sought are not granted, the interests of Trans-Nzoia County in general will be gravely jeopardized as critical public service may be rendered by persons who are not qualified to do so.
- xix. That some of the persons recruited in the impugned manner are expected to offer critical medical services and if left unchecked may irreversibly affect the lives and/or health of the residents of Trans-Nzoia.
- xx. That it is therefore in public interest that this application be allowed as prayed.
- xxi. That it is in the wider interests of substantial justice that this application is allowed as prayed
- xxii. That the grant of the orders as sought in this application will not determine the Petition herein rather it will preserve the substratum of the Petition so that it is not rendered moot or academic.

5. The application is opposed. The 1<sup>st</sup> Respondent filed an affidavit in reply sworn by Peter M. Wamoto its chairperson on 23<sup>rd</sup> April 2025. He averred that the petition had been filed prematurely as the Petitioners ought to have appealed pursuant to Section 87(2) of the Public Service Commission Act which requires exhaustion of internal dispute mechanisms.
6. The 1<sup>st</sup> Respondent maintains that the recruitment process was conducted lawfully, beginning with a proper advertisement on 19<sup>th</sup> October 2024, followed by valid shortlisting, interviewing and eventual appointments based on fair competition and merit.
7. It is the 1<sup>st</sup> Respondent's contention that any variations between the number of advertised vacancies and the number of persons appointed were lawful and arose from formal written requests made by departmental Chief Officers under Section 63(2)(a) of the County Governments Act.
8. According to the 1<sup>st</sup> Respondent, the Human Resource Management Officer II vacancies increased from one to eight after a documented request, while ECDE positions were adjusted based on operational needs and that in certain

technical cadres, fewer candidates were appointed than the advertised number because some applicants were found unsuitable through the interview process.

9. The Respondent further stated that it handled a total of fifty-three (53) appeals from applicants who were initially not shortlisted. That some of these appeals were successful, and the successful appellants were subsequently shortlisted and interviewed.
10. On whether there was constitutional compliance, the 1<sup>st</sup> Respondent asserted that the process adhered to principles of ethnic diversity, regional representation across all 25 wards and gender balance, highlighting that of the 260 appointees, 160 were female and 100 were male in line with the gender principle under Article 27(8) of the Constitution.
11. It is the 1<sup>st</sup> Respondent's contention that suspending or restraining the recruitment process would infringe on the rights of successful candidates to employment and career advancement.
12. In the end, the 1<sup>st</sup> Respondent argued that the Petitioners' application lacks merit and raises no substantive legal grounds.

13. The court was urged to dismiss it with costs.
14. On 2<sup>nd</sup> July 2025, parties were directed to file written submissions. Both parties filed submissions which I have considered.

### **DETERMINATION**

15. Having considered the application, the rival affidavits and submissions of the parties herein, I find the issues for determination to be: -

- i. Whether the Petition is premature for failure to exhaust alternative dispute resolution mechanisms under Section 87(2) of the Public Service Commission Act.
- ii. Whether the conservatory orders sought should be granted pending the hearing and determination of the main Petition.
- iii. What orders should issue?

*Whether the Petition is premature for failure to exhaust alternative dispute resolution mechanisms under Section 87(2) of the Public Service Commission Act.*

16. The 1<sup>st</sup> Respondent contends that the Petition is premature, arguing that the Petitioners ought to have first appealed under Section 87(2) of the Public Service Commission Act, which provides for the exhaustion of internal dispute resolution mechanisms before approaching the Court.

17. The Doctrine of Exhaustion is defined in **Black's Law Dictionary 11<sup>th</sup> Edition** as follows: -

*“**exhaustion of remedies.** The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary.”*

18. While it is generally desirable for parties to exhaust alternative dispute resolution mechanisms before approaching the Court, it is well-established that where there is a real risk of irreparable harm or prejudice, the Court may intervene to preserve the subject matter of the dispute.

19. In ***William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR***, the Court emphasized that the exhaustion doctrine serves to encourage alternative dispute resolution but is not absolute, particularly where fundamental rights are implicated or where statutory remedies are unsuitable.
20. Similarly, in ***R. v Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte NASA (2017) eKLR***, the court recognized exceptions to the exhaustion requirement in cases involving public interest, constitutional interpretation, or urgent circumstances where delay would defeat the purpose of the remedy.
21. In the instant case, the Petitioners allege violations of their fundamental rights.
22. In the court's considered view, where a suit primarily seeks to enforce constitutional rights and freedoms, and the claimed violations are genuine and not merely framed in Bill of Rights language as a pretext, the Petition is not barred by the doctrine of exhaustion. The enforcement of fundamental

rights is a matter that can only be determined by the Court, and in this instance, urgent intervention is justified.

23. Accordingly, the Court finds that the Petition is not premature and that the exceptions to the exhaustion doctrine apply. The Petitioners are entitled to seek judicial intervention to protect both their rights and the Public Interest

*Whether the conservatory orders sought should be granted pending the hearing and determination of the main Petition*

24. The Petitioners seek conservatory orders restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from issuing employment letters or proceeding with recruitment arising from the advertisement dated 19<sup>th</sup> October 2024 pending the hearing and determination of the Petition.
25. They have argued that without such interim relief, appointments may be issued to persons whose recruitment is alleged to be irregular, potentially resulting in unnecessary claims against public funds, disruption of essential services, and rendering the Petition academic.

26. The Respondents in opposition to the application asserted that the recruitment process was conducted lawfully and that granting the interim orders would infringe on the rights of successful candidates to employment and career advancement.
27. Conservatory orders are intended to prevent imminent or irreparable harm and to maintain the subject matter of the dispute pending full determination. In considering whether conservatory orders should issue, courts are guided by the principle of balancing the interests of the parties, preserving the status quo, and protecting the public interest. The Supreme Court in **Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others** set the principles for grant of conservatory orders as follows:

*[86] ..... Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.*

28. In **Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR**, the Court summarized the principles for grant of conservatory orders as: -

(i) The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.

(ii) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.

(iii) Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.

(iv) Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

29. Again, in **Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No.154 of 2016 (2016) eKLR**

the Court summarized three main principles for consideration on whether to grant or decline to grant conservatory orders as follows: -

- a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.
- b. Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
- c. The public interest must be considered before grant of a conservatory order.

30. The above principles are, however, not exhaustive. Depending on the nature of the matter under consideration, there may be other parameters which a Court ought to consider that may vary from case to case.

31. The Petitioners have established that they have a prima facie case. They have demonstrated to the satisfaction of the court that there is a real and imminent risk that the 2<sup>nd</sup> Respondent may proceed to issue employment letters to

individuals irregularly recruited under the advertisement dated 19<sup>th</sup> October 2024. Should such letters be issued before the hearing and determination of the main Petition, the relief sought therein would be rendered nugatory, as the appointments would have been finalized and the appointees may have commenced their duties. This scenario would likely result in significant complications, including claims for salaries, benefits, and other entitlements from public funds by persons whose appointments are now disputed.

32. The Applicants have further demonstrated that should the conservatory orders not be granted, their constitutional rights will be violated as they are likely to be denied fair consideration in the recruitment process.
33. 1<sup>st</sup> Respondent through the replying affidavit Peter M. Wamoto its chairperson, admitted many of the averments of the Petitioners such as variations between the number of advertised vacancies and the number of persons appointed. It also admitted that there were irregularities which led to 53 appeals from applicants who were initially not shortlisted, that some of these appeals were successful and the

successful appellants were subsequently shortlisted and interviewed.

34. It is thus my finding that the Petitioners have made out a sufficient case for the grant of conservatory orders to maintain the status quo pending the hearing and determination of the Petition.

35. In light of the circumstances, and in exercise of the Court's discretion, it is just and equitable to grant the conservatory orders to maintain the status quo pending the hearing and determination of the Petition so as to ensure that the rights of all parties are safeguarded while the Court addresses the substantive issues raised in the Petition.

36. Accordingly, the application is allowed in the following terms:

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- i. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents, by themselves or through their agents or servants, are restrained from issuing any employment letters or proceeding with recruitment arising from the advertisement dated 19<sup>th</sup> October 2024 pending the hearing and determination of the Petition.

ii. The costs of this application shall be in the cause.

37. Orders accordingly

**DATED, DELIVERED AND SIGNED  
THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**M. ONYANGO  
JUDGE**