

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

**CONSTITUTIONAL PETITION NO. E005 OF 2024**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: ARTICLES 2, 3, 19, 20, 21, 24, 50, 258,  
AND 259 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF  
FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 22, 23, 27,  
35, 41, 47, 162(3) (b), 159 AND 232 OF THE CONSTITUTION OF  
KENYA 2010**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF SECTIONS 10,  
13(1), 17, 37 AND 41 OF THE PUBLIC SERVICE ACT  
IN THE MATTER OF CONTRAVENTION OF SECTION 51(1) OF  
COMPETITIONS ACT NO 12 OF 2010**

**IN THE MATTER OF: CONTRAVENTION AND LABOUR  
RELATIONS**

**IN THE MATTER OF: ADVERTISEMENT, SHORTLISTING  
AND RECRUITMENT OF THE DEPARTMENT OF HEALTH  
AND SANITARY BUNGOMA COUNTY, MUNICIPALITY**

**BOARD MEMBERS POSITION (Kimilili and Bungoma  
municipality)**

**BETWEEN**

**NEWTON SIKOBE NDENGU ..... 1<sup>ST</sup> PETITIONER**  
**NICHOLAS KIMAGUT ..... 2<sup>ND</sup> PETITIONER**  
**CAREN SIMIYU ..... 3<sup>RD</sup> PETITIONER**  
**JEMIMAH KIKECHI ..... 4<sup>TH</sup> PETITIONER**  
**VIVIAN SIMPANO ..... 5<sup>TH</sup> PETITIONER**  
**JACKLINE MAKOKHA ..... 6<sup>TH</sup> PETITIONER**  
**JUSTUS AKUKU ..... 7<sup>TH</sup> PETITIONER**

**(ON BEHALF OF OTHERS)**

**VERSUS**

**COUNTY PUBLIC SERVICE BOARD  
OF BUNGOMA .....1<sup>ST</sup> RESPONDENT**  
**COUNTY SERVICE BUNGOMA .....2<sup>ND</sup> RESPONDENT**  
**CHIEF OFFICER HEALTH  
COUNTY BUNGOMA .....3<sup>RD</sup> RESPONDENT**  
**COUNTY GOVERNMENT OF BUNGOMA.....4<sup>TH</sup> RESPONDENT**

**(BEFORE HON. JUSTICE DAVID NDERITU)**

**JUDGMENT**

**I. INTRODUCTION**

1. The petitioners commenced these proceedings by way of a petition

dated 24th October 2024 filed through Wafula Masinde & Company Advocates. However, with the leave of the court, the petitioners filed an amended petition dated 3rd March 2025 through Austine Arnold & Associates Advocates seeking for the following reliefs –

- a) A declaration that the respondents have violated and/or have continued to violate the petitioners and other employees constitutional rights and in particular, Articles 2, 3, 10, 19, 20, 24, 35, 41 and 47(2) of the Constitution of Kenya 2010.*
- b) A declaration revoking the advertisement on 2<sup>nd</sup> day of August 2024 which appeared in the standard and Daily Nation Newspapers of Friday August 16<sup>th</sup>, 2024, and county website., selection and recruitment therefrom.*
- c) A declaratory Order compelling the respondents to place the affected employees on Permanent and pensionable terms.*
- d) In the alternative to prayer c above, a declaration that the respondents be directed to re-advertise the positions as internal advert and fill the same in accordance with the criteria and qualification in the advertisement within 30 days.*
- e) A declaratory order compelling the respondents to compute, calculate and or tabulate the pending salary arrears, leave days and allowances owing to the petitioners and pay them.*

- f) Damages for violation above.*
- g) Costs of this petition and interest on e above.*
- h) Any other relief which this honorable court may deem just and appropriate.*
2. The amended petition is supported with the “amended supporting affidavit” of Newton Sikobe Ndengu, the 1st petitioner, sworn on 3rd March 2025. Of course, an affidavit cannot be amended and this affidavit was subsequently withdrawn on 25th March 2025.
  3. The petitioners filed a list and bundle of documents dated 2nd March 2025. They also filed a further affidavit sworn by the 1st petitioner on 12th November 2024.
  4. Through the County Attorney, the respondents filed a joint response to the initial petition dated 5th November 2024 and a replying affidavit sworn by Joseph Samita Makata, the Chief Executive Officer of the 1st respondent, sworn on 5th November 2024.
  5. By consent, the court directed that the petition be canvassed by way of written submissions. Mr. Omondi for the petitioners filed written submissions dated 13th April 2025. No submissions were filed by or for the respondents.

## **II. PLEADINGS & EVIDENCE**

6. The petitioners pleaded that they are periodic employees of the 4th respondent on short-term periodic contracts offering various medical services. It is pleaded that their terms of service are less favourable

compared to their contemporaries working on permanent and pensionable terms. It was further pleaded that the petitioners have been subjected to hostile and difficult working conditions including delayed salary, lack of insurance medical cover, deduction and non-remittance of statutory dues, underpay, working overtime without pay, denial of leave, denial of right to join and participate in union activities, amongst other violations.

7. It is further pleaded that on 2nd August 2024 the 1st respondent announced vacancies for permanent and pensionable employment for the roles, positions, and the services that the petitioners have occupied for long periods of time based on the short-term contracts as alluded to above. It is pleaded that despite the petitioners meeting the required qualifications and submitting their applications for the advertised vacancies and positions, the 1st respondent overlooked them and instead shortlisted “outsiders”. It is thus pleaded that the respondents deliberately elbowed the petitioners and locked them out of the permanent and pensionable vacancies and hence the orders and reliefs sought in the petition.
8. In the supporting affidavit, it is deposed that the petitioners have been engaged by the 4th respondent through the 1st respondent on various short-term contracts some of them cumulatively, such as the 1st petitioner’s, totaling to 11yrs or more. It is stated that during those various periodic contracts the petitioners have suffered abuse

and violation as alluded to above.

9. It is deposed that as a result of consulted lobbying the respondents agreed to advertise for permanent and pensionable employment in the cadre and positions occupied and held by the petitioners with the primary objective and understanding of enabling and prioritizing the petitioners to join permanent and pensionable employment.
10. It is deposed that to the amazement and bemusement of the petitioners, the advert placed by the 1st respondent in two local dailies on 2nd August 2024 did not indicate that the vacancies were to be filled internally and this alleged omission purportedly exposed the petitioners to unfair competition. It is deposed that through this process the respondents negated on their promise to transit the petitioners from short-term contracts to permanent and pensionable employment.
11. It is deposed that, nonetheless, the petitioners applied for various positions but the 1st respondent omitted the names of the petitioners in the shortlisted applicants who were to be interviewed from 28th October to 8th November, 2024. It is deposed that no reasons were offered as to why the names of the petitioners were excluded from the list of the interviewees.
12. It is the foregoing state of affairs that offended the petitioners and prompted them to file the petition herein.
13. In the response to the petition it was pleaded that the petitioners were

unlawfully and irregularly and without the knowledge and or consent of the 1st respondent engaged on short term contracts as pleaded to perform various duties within the various hospitals owned and operated by the 4th respondent. It is denied that the 1st respondent issued any of the purported short-term contracts to the petitioners.

14. It was thus pleaded that the petitioners are strangers to the 1st respondent and were to apply for the advertised vacancies competitively like everyone else and were not entitled to any preferential treatment. It was pleaded that all the information pertaining to the recruitment process was posted on the website of the 4th respondent and the same was accessible to the petitioners, all and sundry.
15. In the replying affidavit, it is deposed for all the respondents that on 2nd August 2024 the 1st respondent advertised for various positions in the department of health and sanitation and municipality boards within Kimilili and Bungoma Municipalities in the department of lands, urban areas, physical planning and housing. The advert for the said vacancies appeared in the Standard and the Daily Nation newspapers of 16th August, 2024. It is deposed that the advert was also placed on the 4th respondent's website.
16. It is deposed that all the petitioners herein were either over-qualified or under-qualified for the various positions that they applied for and that this explains why they were not shortlisted for the interviewing.

The minimum qualifications for each of the positions applied for by each of the petitioners and the purported qualifications for each of the petitioners are listed in the affidavit.

17. It is deposed that there is no evidence adduced by the petitioners that they have indeed been in the employment of the 4th respondent on whatever terms or conditions and the court is urged to find and hold that the petition herein is misplaced, unfounded, and filed in bad faith.
18. The petitioners restated and reasserted their petition and the contents of the supporting affidavit in their supplementary affidavit stating the qualifications of each petitioner and the vacancies applied for.

### **III. SUBMISSIONS BY COUNSEL**

19. Counsel for the petitioners isolated the following issues for interrogation and determination by the court –
- i. Whether the petitioners constitutional rights were denied or violated?*
  - ii. Whether the petitioners termination was fair and lawful?*
  - iii. Whether the petitioners have enforceable legitimate expectation of employment by the respondents*
  - iv. Whether the petitioners are entitled to remedies sought?*
  - v. Who should pay the costs for this petition?*

20. On the first issue, it is submitted that this court (ELRC) has jurisdiction to deal with the constitutional issues raised in the petition

as the same relate to employment. Counsel cited the Supreme Court decision in *Kenya Tea Growers Association & 2 Others V National Social Security Fund Board of Trustees & 13 Others (2023) KESC 63 (KLR)* and *Nicholus Abidha V Attorney General & 7 Others (2023) KESC 113 (KLR)* to the effect that ELRC has jurisdiction over constitutional issues relating to and concerning disputes in employment and labour relations.

21. It is submitted that the rights of petitioners as guaranteed under *Articles 10, 27, 35, 41, & 47 of the Constitution* were violated by the respondents discriminating the petitioners and terminating them unfairly.
22. On the second issue, it is submitted that the petitioners had worked for the 4th respondent for periods ranging from six to 11yrs and as such had legitimate expectation for job security and eventual formalization of their engagement. It is thus submitted that the termination was unfair and unlawful.
23. On the third issue, counsel cited *Re Westminister City Council (1986) A.C.* and *Oindi Zaipelline & 39 Others V Karatina University & Another (2015) eKLR* in support of the *doctrine of legitimate expectation*, arguing that the conduct of the respondents implied to the petitioners that they were at some point to be engaged on permanent and pensionable basis and terms.
24. It is further submitted that the adverts by the respondents for the

positions held by the petitioners in August 2024 and the subsequent shortlisting was discriminatory and unfair to the petitioners who held legitimate expectation that they were to take up the said vacancies.

25. On the fourth issue, it is submitted that the petitioners are entitled to the reliefs sought. It is further submitted that the petitioners were in continuous employment of the 4th respondent and as such they are entitled as claimed.

26. The court is urged to allow the petition with costs.

#### **IV. ISSUES FOR DETERMINATION**

27. In my considered view the following issues commend themselves to the court for interrogation and determination –

- i. Whether the petitioners were lawful employees of the 4th respondent at any time or at all?*
- ii. Whether the petitioners were unfairly and unlawfully terminated?*
- iii. Whether the petitioners have established and proved their petition?*
- iv. Whether the petitioners are deserving of the reliefs sought?*
- v. Costs.*

28. The 1st respondent is the lawfully authorized body to recruit employees for and on behalf of the 4th respondent. Other than on secondment from, for example, the National Government through the Public Service Commission, no person should purport to be an

employee of a County Government unless and until properly, fairly, and lawfully recruited by the respective County Government in accordance with the law.

29. The petitioners herein purport to have been employees of the 4th respondent. Logically and legally, they had to prove that indeed they were recruited to the alleged employment by and or through the 1st respondent or that they were lawfully and procedurally seconded to those positions.
30. The respondents have disowned the petitioners as strangers or imposters who, if at all, pretended to work for the 4th respondent but without due process in their recruitment. The court has scrutinized the purported letters of appointment, contracts, and or extensions thereof as availed and filed by the petitioners and noted that none of the said documents were issued by the 1st respondent as demanded by the law. The letters presented in court as evidence of engagement or employment were all signed by the medical superintendents of various hospitals and health facilities within the territory of the 4th respondent.
31. For clarity and avoidance of doubt, the above-mentioned persons had no legal capacity or authority to engage and or employ for and on behalf of the 1st respondent. No evidence was availed by the petitioners establishing and proving that indeed authority had been delegated to the said medical officers by the 1st respondent to recruit

and or engage the petitioners as claimed.

32. Further, there is no evidence availed by the petitioners that indeed they earned a salary, wage, or allowance from the 4th respondent for their alleged employment, engagement, and or services rendered to the 4th respondent.

33. For the foregoing reasons, the petitioners failed to establish and prove that they were indeed employees of the 4th respondent duly recruited and engaged through the 1st respondent in accordance with the law. There was thus no employment relationship between the petitioners and the 4th respondent.

34. If at all the petitioners worked for the 4th respondent, which was however not established and proved, the said relationship was unlawful and illegal as they were not properly and lawfully recruited by the 1st respondent. Two wrongs cannot make and or create a right(s). An illegal or non-existent relationship cannot create statutory or constitutional rights and obligations.

35. The petition herein is not only fake but also in total abuse of the court process. No legitimate expectation can be founded on nothing or on unlawful process. An illegal process cannot create legal rights and obligations. The petitioners were not and have never been lawful employees of the 4th respondent properly and lawfully recruited by the 1st respondent. For this very reason, this petition shall fail.

36. Consequent to the above finding and holding, the petitioners were

not entitled to any preferential treatment for the vacancies advertised by the 1st respondent in August 2024. They were supposed to apply for consideration like all the other applicants. The interviews were conducted and concluded in October 2024 and the court has no business entering into the workplace to manage such human resources management process. In any event, the petitioners failed to demonstrate and prove that the process was flawed and or unlawful.

37. Clearly and evidently, the petitioners have failed to prove their petition to the standard set out in *Anarita Karimi Njeru V Republic (1979) KLR* and *Mumo Matemu V Trusted Society of Human Rights Alliance (2014) eKLR*.
38. While this court has original and unlimited jurisdiction in matters employment and labour relations, the court has to be careful not to descend to the arena and manage or micromanage the human resources factor in either the private and or public institutions. The court should only intervene when properly called upon and its jurisdiction invoked based on the constitutional and statutory imperatives applicable.
39. Since there never was any lawful employment relationship between the petitioners and the 4th respondent, there is absolutely no basis for the court awarding the petitioners as prayed.
40. The petition is hereby dismissed for lack of merits.

**V. ORDERS**

41. The court makes the following orders –

- a) This petition is hereby denied and dismissed.*
- b) No order as to costs.*

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT  
BUNGOMA THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2025.**

.....  
**DAVID NDERITU**  
**JUDGE**