

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT ELDORET

PETITION NO. E006 OF 2024

(Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010
ARTICLES 19, 20, 21, 22, 23, 27, 35, 41, 47, 50, 73 AND
159**

AND

**IN THE MATTER OF BREACH OF FUNDAMENTAL RIGHTS
AND FREEDOMS CONTRARY TO CHAPTER FOUR OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTIONS 15,16 AND 17 OF THE
NATIONAL GOVERNMENT COORDINATION ACT**

AND

**IN THE MATTER OF SECTION 36 OF THE PUBLIC SERVICE
COMMISSION REGULATIONS, 2019**

BETWEEN

ESAU CHERUIYOT LAGAT 1ST PETITIONER

NELSON KIPKORIR 2ND PETITIONER

DAMARIS JEPKIRUI 3RD PETITIONER

JOHN KIBET ROTICH 4TH PETITIONER

JOHACHIM CHEPSIROR CHEMEY 5TH PETITIONER

VERSUS

DANCAN AVEDI 1ST

RESPONDENT

DEPUTY COUNTY COMMISSIONER,

KAPKANGANI SUB-COUNTY 2ND

RESPONDENT

THE PUBLIC SERVICE COMMISSION 3RD

RESPONDENT

THE CABINET SECRETARY, MINISTRY OF INTERIOR

AND NATIONAL CO-ODINATION 4TH

RESPONDENT

HON. ATTORNEY GENERAL 5TH

RESPONDENT

JUDGMENT

1. The Petitioners are residents of Tindinyo Sub-location the said sub-location were applicants for the post of Assistant Chief for Tindinyo Sub-location within Nandi County. On 17th August, 2023, the Ministry of Interior and National Administration through the Deputy County Commissioner Nandi County placed an advertisement for the post of Assistant Chief II Tindinyo Sub-location. The 1st, 2nd and 3rd Petitioners applied for the post. The 1st Respondent also applied for the post and was successful.

2. Among the requirements for applicants to qualify for the advertised post was that the applicant must be a resident of Tindinyo Sub-location.
3. The Petitioners filed the present Petition dated 30th May 2024 alleging violations arising from the recruitment and appointment of the 1st Respondent as Assistant Chief.
4. The 1st Respondent is the newly appointed Assistant Chief of Tindinyo Sub-location. The 2nd Respondent is an administrative officer within the National Executive arm of Government, the 3rd Respondent is a Constitutional Commission established under Article 233 of the Constitution, the 4th Respondent is the Cabinet Secretary for Interior and National Administration and the 5th Respondent is the Chief Legal Advisor to the Government.
5. The Petitioners aver that through a re-advertisement dated 17th August 2023, the 2nd, 3rd and 4th Respondents invited applications for one vacancy of Assistant Chief II for Tindinyo Sub-location and that one of the mandatory prerequisites for eligibility was residency within Tindinyo Sub-location.
6. According to the Petitioners, several qualified residents of Tindinyo Sub-location applied for the position, including

the 1st, 2nd and 3rd Petitioners. They contend that despite this, the 2nd to 5th Respondents appointed the 1st Respondent, whom they allege is not a resident of Tindinyo Sub-location but of Chepsonoi Sub-location, Kapkangani Location.

7. They assert that the appointment was irregular, unlawful and contrary to the legitimate expectations of residents.
8. The Petitioners contend that on 26th April 2024, they held a meeting with the Deputy County Commissioner, Nandi Central, to raise their grievances and seek intervention, but the inauguration of the 1st Respondent proceeded nonetheless on 1st May 2024 at Mombor Primary School.
9. The Petitioners further aver that the Nandi Gaa Kaburwo Council of Elders wrote to the Cabinet Secretary protesting the appointment of the 1st Respondent but no action was taken nor was a response forthcoming from the 2nd, 3rd and 4th Respondents.
10. It is the Petitioners' case that all efforts to have the 2nd, 3rd and 4th Respondents revoke the impugned appointment and conduct a fresh recruitment exercise were rejected. They assert that the conduct of the 2nd, 3rd and 4th Respondents violated their rights to fairness and fair

labour practices and contravened the legitimate expectations of the residents of Tindinyo Sub-location.

11. The Petition is supported by the affidavits sworn by the Petitioners, in which they reiterate that the 1st Respondent did not meet the residency requirement and that the 2nd, 3rd and 4th Respondents acted in an arbitrary and unfair manner in appointing him as the Assistant Chief II for Tindinyo Sub- location.

The Response to the Petition

12. The 1st Respondent opposed the Petition through a Replying Affidavit sworn on 7th February 2025. He states that pursuant to the re-advertisement dated 17th August 2023, he submitted his application on 21st August 2023 fully aware of the requirements of the position, and that he received an invitation letter dated 13th October 2023 inviting him for an interview scheduled for 24th October 2023 which he attended.
13. The 1st Respondent contends that after the interviews were concluded, he received an offer letter of appointment dated 27th March 2024 from the 3rd and 4th

Respondents through the office of the 2nd Respondent and was subsequently sworn into office on 1st May 2024.

14. According to the 1st Respondent, the instant Petition has been filed maliciously and is motivated by discrimination against him on account of his tribe but is disguised as an objection to his residency.
15. In response to the allegation by the Petitioners that he is not a resident of Tindinyo Sub location, the 1st Respondent maintains that he has lived in Tindinyo for over 15 years, resides there with his family, operates businesses at Tindinyo Market and resides on land parcel Tindinyo/1, Plot No. 1, where he was settled by his late father in 2011. He further states that he has been paying property rates for the said parcel and therefore fully meets the residency requirement.
16. It is the 1st Respondent's contention that the Petitioners have not demonstrated any illegality, irregularity or violation of the principles of integrity, transparency or accountability in the recruitment process to warrant the court's intervention.
17. In the end, the court was urged to dismissed the petition with costs.

18. The 3rd Respondent filed a replying affidavit of Paul Famba, its Secretary/Chief Executive Officer (CEO) sworn on 28th March, 2025. The CEO states that the Mandate of the 3rd Respondent is set out at Article 234 of the Constitution, among them the appointment of persons to hold office in the public service and to promote the values and principles referred to in Article 10 and 232 of the Constitution throughout the public service, to ensure the public service is efficient and effective.
19. Mr. Famba deposes that the 3rd Respondent is under Article 233(5) and section 31 of the Public Service Commission Act, authorized to delegate with or without conditions, some of its functions and powers to any one or more of its members, or to any officer, body or authority.
20. That Regulation 5 of the Public Service Commission Regulations further allow it to delegate its powers to an authorized officer.
21. Mr. Famba states that pursuant to the provisions referred to above, the 3rd Respondent through the delegation instrument Ref No. PSC/SEC/93/37/Vol. VI (31) dated 14th December, 2022 delegated its function to the Authorized Officer at the Ministry of Interior and Coordination of

National Government to exercise its mandate to appoint Chiefs and Assistant Chiefs.

22. Mr. Famba deposes that the Ministry of Interior and Coordination of National Government, through an advertisement dated 17th August, 2023, advertised for the position of Assistant Chief II Tindinyo Sub-Location in Kapkangani Sub-County. He deposes that a total of 15 were received among them the 1st, 2nd and 3rd Petitioners. That when shortlisting for the position was done the 1st, 2nd and 3rd Petitioners were among 9 candidates shortlisted. That interviews were conducted on 24th October, 2023 and 3 candidates recommended for appointment, with the 1st respondent having scored the highest at 88.4.
23. It is deposed that the Ministry sought information on all shortlisted candidates from the National Intelligence Service and by a report dated 24th October, 2023 it was confirmed that the 1st Respondent was a resident of Tindinyo Sub-Location.
24. It is the averment of the 3rd Respondent that the appointment of the 1st Respondent was done in line with Article 232 of the Constitution, the Public Service Act and

Revised Scheme of Service for National Government Administrative Officers, October, 2025.

25. It is the position of the 3rd Respondent that what the Petitioners are asking the court is to go against the said principles. That the petition is thus unmeritorious, bad in law and is for dismissal.
26. The Petition was disposed of by way of written submissions.

The Petitioners' submissions

27. The Petitioners in their written submissions dated 3rd June 2025 identified the issues for determination to be:-
 - i. Whether the 2nd, 3rd and 4th Respondents breached the Petitioners' constitutional rights by appointing the 1st Respondent as Assistant Chief of Tindinyo Sub-location
 - ii. Whether the legitimate expectation that minimum qualifications would be considered during the recruitment process was breached
 - iii. Whether the Petitioners are entitled to the reliefs sought; and
 - iv. Who pays for the costs of the suit

28. On the first issue, the Petitioners have submitted that the 2nd, 3rd and 4th Respondents breached their constitutional rights by appointing an individual who did not meet the mandatory requirements for the advertised position. They contend that the decision of the 2nd, 3rd and 4th Respondents was erroneous and denied them an equal opportunity to be appointed as Assistant Chief.
29. The Petitioners aver that despite their efforts to engage the 2nd, 3rd and 4th Respondents to rectify the alleged error, no corrective action was taken thereby violating Articles 27, 28, 41, 47, 48 and 50 of the Constitution.
30. It is their submission that the advertisement dated 17th August 2023 set out the mandatory requirements for appointment of Assistant Chief including the requirement that a candidate must be a resident of the relevant sub-location, but the 2nd, 3rd and 4th Respondents acted contrary to the express terms of the advertisement by appointing the 1st Respondent, a resident of Chepsonoi Sub-location and not Tindinyo Sub location.
31. On the second issue, the Petitioners submit that the 2nd, 3rd and 4th Respondents breached the legitimate expectation that the minimum qualifications stated in the

advertisement would be adhered to during the recruitment process. They argue that the failure to consider the residency requirement amounted to an unlawful deviation from the criteria set out for the position.

32. On this basis, the Petitioners assert that they legitimately expected the Respondents to act in accordance with the law and adhere strictly to the mandatory requirements stipulated in the advertisement of 17th August 2023.
33. It is the Petitioners contention that by dispensing with this mandatory requirement, the 2nd, 3rd and 4th Respondents breached their statutory duty and the legitimate expectations created by the recruitment notice.
34. With regard to the third issue, the Petitioners submit that they are entitled to the reliefs sought, contending that their constitutional rights were infringed by the 2nd, 3rd and 4th Respondents. They maintained that the appointment of the 1st Respondent was erroneous and that the 2nd, 3rd and 4th Respondents breached the legitimate expectation that the mandatory qualifications, including residency criteria stipulated in the advertisement, would be duly considered during the recruitment process.

35. Accordingly, the Petitioners submit that they are entitled to declarations that their rights to fairness and fair labour practices were violated, to an order quashing the impugned appointment, and to a directive that a fresh recruitment exercise be conducted in accordance with the law.
36. On costs, the Petitioners contend that they have proved their case to the required standard and that the 2nd, 3rd and 4th Respondents should therefore be condemned to pay their costs of the Petition.

The 1st Respondent's submissions

37. In his submissions dated 13th June 2025, the 1st Respondent identified the issues for determination to be:
- a. Whether the appointment of the 1st Respondent complied with the lawful recruitment procedure and whether the appointment of the 1st Respondent violated the Constitution
 - b. Whether the reliefs sought should be granted.
38. On the first issue, the 1st Respondent submits that the recruitment process was conducted in compliance with the applicable legal framework and that all applicants were given a fair and equal opportunity to participate. He

contends that he followed due process, attended the interview, and was appointed on merit after emerging the successful candidate.

39. The 1st Respondent maintains that his appointment was made in accordance with Article 47 of the Constitution and the Fair Administrative Action Act, 2015, particularly section 4(3), which sets out the requirements for lawful administrative action. In this regard, the 1st Respondent submitted that the process was fair, transparent and procedurally sound.
40. The 1st Respondent submitted that the petition is primarily based on the single eligibility criteria that the candidate for appointment was to be a resident of Tindinyo sub-location.
41. It is his submission that he lives with his family on plot no. Tindinyo/1 within Tindinyo market, Tindinyo sub-location, he has been operateing a business in the same premises for over twelve years and the area chief within which the Tindinyo sub-location lies has further that indeed he is a resident of Tindinyo sub-location from the year 2011 to date. In support of the averments that he is a resident of Tindonyo, the 1st Respondent placed reliance on the case

of *Shatsala & another v Kevin & 2 others (Petition 9 of 2023) [2024] KEELRC 1022 (KLR) (16 April 2024) (Judgment)*

42. In addition, the 1st Respondent submits that Article 39(3) of the Constitution guarantees every citizen the right to reside anywhere in Kenya, and that residency cannot be determined by ethnicity or place of birth. He argues that he satisfied the residency requirement and the Petitioners have not demonstrated otherwise.
43. On whether the orders sought should be granted, the 1st Respondent submitted that the Petitioners, apart from claims of non-residency of the 1st Respondent, have not laid any basis for the assertion that their legitimate expectation has been violated. It is the 1st Respondent's submission that having clearly demonstrated that he is a resident of Tindinyo, the claim of legitimate expectation of the Petitioners cannot supersede that of the 1st Respondent since he, like them, was an applicant for the same position and thus have an equal status to the legitimate expectation for appointment.
44. Further, it is submitted that the claim by the Petitioners of discrimination is unsupported, as they have not provided

any evidence to demonstrate that the actions of the 2nd, 3rd and 4th Respondents were discriminatory.

45. In addition, the 1st Respondent has maintained that the Petitioners have not placed before the court sufficient evidence to show that their constitutional rights were violated or that the appointment process was flawed or inconsistent with the law.
46. Consequently, the court was urged to find that the Petitioners have failed to prove their case on a balance of probabilities and to dismiss the Petition with costs.

Determination

47. From the Petition, the response thereto and the written submissions on record, the issues that arise for determination are: -
 - i. Whether the recruitment and appointment of the 1st Respondent complied with the Constitution, the law and the terms of the advertisement
 - ii. Whether the Petitioners' rights and legitimate expectations were violated
 - iii. What orders should issue?

Whether the recruitment and appointment of the 1st Respondent complied with the Constitution, the law and the terms of the advertisement

48. The advertisement dated 17th August 2023 explicitly required that candidates for the position of Assistant Chief II must inter alia, be residents of Tindinyo Sub-location.
49. The Petitioners' main grievance is that the 1st Respondent did not meet the mandatory residency requirement as set out in the advertisement. They argue that he is a resident of Chepsonoi Sub-location and not Tindinyo Sub-location rendering him ineligible for appointment as Assistant Chief of Tindinyo Sub location.
50. The Petitioners assert that the 2nd, 3rd, and 4th Respondents acted contrary to law and the express terms of the advertisement by appointing a non-resident.
51. The 1st Respondent disputes this claim, maintaining that he is a resident of Tindinyo Sub-location. In support, he annexed copies of business permits for enterprises he operates within Tindinyo, receipts evidencing payment of land rates for Plot No. Tindinyo/1, where he resides with his family, and a letter from the Chief of Kapkangani Location confirming his residence in Tindinyo Sub-location.

52. Residence is a factual matter established by evidence. The Petitioners did not place before the Court any documentation or testimony demonstrating that the 1st Respondent is not a resident of Tindinyo Sub-location. Their allegation remains a bare assertion.
53. The 1st Respondent, on the other hand, presented credible evidence of continuous residence and socio-economic activity within Tindinyo Sub-location.
54. While Article 39 of the Constitution guarantees every citizen the right to reside anywhere in Kenya, where a recruitment notice requires residency within a specific administrative unit, compliance must be assessed based on actual residence rather than ethnicity, birth, or ancestral origin.
55. From my evaluation of the evidence, 1st Respondent meets the factual test of residence as contemplated in the advertisement.
56. The Petitioners cited Articles 27, 41, 47, 48, and 50 of the Constitution but did not demonstrate how their rights under these provisions were infringed by any of the Respondents. Constitutional violations cannot be inferred. They must be proved through evidence linking the

impugned action to the alleged breach. No such evidence was provided.

57. On the totality of evidence and submissions, the Petitioners have not shown that the 1st Respondent lacked the mandatory qualifications for the impugned appointment or that the 2nd, 3rd, and 4th Respondents acted unlawfully or unconstitutionally in appointing the 1st Respondent as Assistant Chief II, Tindinyo Sub-location. Accordingly, they have not discharged the burden of proof required in constitutional litigation.

Whether the Petitioners' rights and legitimate expectations were violated

58. The Petitioners' claim of legitimate expectation is founded on the assertion that the mandatory requirements in the advertisement were not adhered to.
59. The Petitioners and the 1st Respondent were all applicants for the same position, and their expectations were competitive and based on merit. Legitimate expectation cannot arise in a context where several candidates compete yet only one can ultimately be appointed.

60. The claim of legitimate expectation by the Petitioners therefore fails.

What orders should issue?

61. Having determined that the 1st Respondent met the qualifications for appointment as Assistant Chief II, Tindinyo Sub-location, the Petitioners are not entitled to any of the reliefs sought.

62. Accordingly, the Petition is dismissed with no order as to costs.

**DATED, DELIVERED AND SIGNED
THIS 27TH DAY OF NOVEMBER, 2025.**

**M. ONYANGO
JUDGE**