

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
ELDORET

PETITION NO. E002 OF 2024

(Before Hon. Lady Justice Maureen Onyango)

**IN THE MATTER OF ENFORCEMENT OF ARTICLES
1,2,3,6,10,19,20,21,22,23,27,73,174,176,179,183,185
AND 196, OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED VIOLATION AND
INFRINGEMENT OF THE RIGHTS AND FREEDOMS IN
ARTICLES 19,20,21,22,23,27,73,174,176,179,183,185
AND 196 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED VIOLATION AND
INFRINGEMENT OF SECTION 30, 58A(1) AND 58A(3) OF
THE COUNTY GOVERNMENTS (AMENDMENT) ACT NO. 11
OF 2020 OF THE LAWS OF KENYA**

BETWEEN

SHADRACK KIPTOLO TARNO..... PETITIONER

VERSUS

NANDI COUNTY

PUBLIC SERVICE BOARD.....1ST RESPONDENT

**COUNTY GOVERNMENT OF NANDI.....2ND
RESPONDENT**

**COUNTY ATTORNEY, NANDI COUNTY.....3RD
RESPONDENT**

JUDGMENT

Background

1. The Petitioner describes himself in the Petition as a resident of Kaptel-Kamoiywo ward within Nandi County.
2. The 1st Respondent is a body corporate established under sections 56 and 57 of the County Governments Act.
3. The 2nd Respondent is a County Government established as such under Article 176 of the Constitution.
4. The 3rd Respondent is the chief legal adviser to the 1st and 2nd Respondents with a mandate to advice on all legal issues relating to civil matters as established under section 7 of the Office of the County Attorney Act.
5. In the Petition dated 27th March 2024, the Petitioner alleges that the Respondents breached Articles 2, 10, 22(1), 24(2), 24(2)(b), 25(a)&(c), 28, 41, 47(1), 159(a)-(d), 176, 232, 235, 258, and 259 of the Constitution; section 22 of the Public Officer Ethics Act; sections 65(1)(a) and 66 of the County Governments Act; and section 5(1) of the Employment Act.
The Petitioner seeks the following reliefs: -

- i. A declaration that the Respondents have violated Articles 19, 20, 21, 22, 23, 27, 73, 174, 176, 179, 183, 185 and 232 of the Constitution
- ii. A declaration that the recruitment made by the Respondents between 1st January 2023 and 1st March 2024 of 1500 contract employees and all appointments made by the Respondent between 1st January 2023 and 1st March 2024, having been done without a competitive process is unconstitutional for offending the preamble to the Constitution and Articles 10, 27(1)(2)(4)(5), 56, 232 and 260 of the Constitution.
- iii. A declaration that the recruitment/appointments by the Respondents between 1st January 2023 and 1st March 2024 to the extent that it is unconstitutional as it offends the preamble to the Constitution and Articles 10, 27(1), (2), (4), (5), 56, 232 and 260 of the Constitution.
- iv. An order of Certiorari be issued to bring into this Court and quash the purported irregular employment made by the Respondents between 1st January 2023 and 1st March 2024
- v. An order of Mandamus directing the Respondents jointly and severally to initiate the recruitment of the 1500

employees in strict compliance with Article 232 of the Constitution and section 66 of the County Governments Act

- vi. Any other or further relief that this court may deem fit to grant.
6. The Petition is supported by the affidavit of Shadrack Kiptolo Tarno, the Petitioner herein.
7. The 1st and 2nd Respondents opposed the Petition vide the Replying Affidavits sworn by CS Nancy Jeruto and Dr. Francis Sang respectively on 20th May 2024. The 3rd Respondent in opposition to the Petition filed Grounds of Opposition dated 15th May 2024.

The Petitioner's Case

8. The Petitioner contends that between January 2023 and March 2024, the Respondents purportedly employed over 1,500 individuals in violation of the Constitution and statutory requirements, including hiring on permanent basis staff whose contracts were expiring.

9. It is asserted that proper recruitment practice requires competitive advertisement of positions depending on county staffing levels, which was allegedly not followed.
10. The Petitioner argues that the recruitment process failed to provide equal opportunities, lacked transparency, and was characterized by favoritism and discrimination, contrary to constitutional principles of equity, social justice, inclusiveness and good governance.
11. Further, the Petitioner alleges that the 1st Respondent was not properly constituted during the period in question, lacking a substantive Chairperson and quorum, rendering the appointments ultra vires.
12. The Petitioner also contends that the 2nd and 3rd Respondents failed to provide guidance or oversight, and that the actions of the 1st Respondent constitute abuse of office and ultra vires acts.

The Respondents' case

13. The 1st Respondent in the Replying Affidavit sworn by its Acting Chief Executive Officer and Secretary to the Board, CS Jeruto deposed that it has been conducting recruitment to the

County Public Service in strict adherence to the Constitution and all applicable laws governing recruitment in the Republic.

14. The 1st Respondent contends that the Petitioner's allegations that it lacks independence in the discharge of its mandate are misplaced, frivolous, and riddled with falsehoods.
15. The 1st Respondent maintained that it is properly constituted in accordance with section 58 of the County Governments Act and therefore conducts its business lawfully and within its statutory mandate. That the current Board members were appointed vide Gazette Notice No. 10250 dated 31st October 2019 for a non-renewable term of six (6) years.
16. The 1st Respondents aver that the then Chairperson, Dr. Daniel Kemei, and one member, Jacob Kipketer Sisey, subsequently resigned, leaving four (4) serving members of the Board. Further, that Ms. Eliseba Jemutai Arusei, being one of the four remaining members and the Vice Chairperson of the Nandi County Public Service Board, was elected in accordance with section 58(6) of the County Governments Act and accordingly assumed the responsibilities of the Chairperson pending the substantive filling of that position.

17. The deponent states that she is currently the Acting Chief Executive Officer and Secretary to the Board pending the substantive filling of the position of Secretary and that as such, the Board is comprised of the Chairperson, three (3) members and the Secretary thus properly constituted within the meaning of section 58 of the County Governments Act.
18. According to the 1st Respondent during the period between 1st January 2023 and 1st March 2024, requests were received from user departments for the renewal of contracts for staff whose terms were about to expire and whose assigned tasks were still pending or whose services continued to be required.
19. It is contended that the 1st Respondent subsequently conducted suitability assessments for the affected staff, affording them an opportunity to demonstrate effectiveness and efficiency in the performance of their duties during the contractual period.
20. The 1st Respondent avers that since the recruitment was for officers serving on contract, it did not require external advertisement as alleged by the Petitioner and that the renewals made thereafter were solely subject to satisfactory performance and in accordance to the needs of the

department and none was discriminated against as alleged by the Petitioner.

21. The 1st Respondent maintained that all appointments made or recruitments done by the 1st Respondent are done in strict adherence to the constitution, the Law and the schemes of service provided by the Public Service Commission.
22. In addition, the Respondents assert that the Petition is incurably vague, as it fails to specify with clarity the constitutional provisions allegedly violated, the nature of the alleged threat, or the injury the Petitioner or the public is likely to suffer. This, they argue, offends Article 50 of the Constitution on fair hearing standards.
23. The 1st Respondent state that the Petition is premature, as the Petitioner failed to exhaust the dispute resolution mechanisms provided under section 77 of the County Governments Act and sections 85, 86 and 87(2) of the Public Service Commission Act and that the Petitioner has not demonstrated any exceptional circumstances to justify bypassing the statutory mechanisms and approaching the court as the first resort.

24. The 2nd Respondent filed a Replying Affidavit sworn by Dr. Francis Sang on 20th May 2024. The deponent states that the 2nd Respondent has never requested any external recruitment or appointment to its public service by the 1st Respondent within the period stated in the Petition.
25. The 2nd Respondent maintained that it has not received any new staff employed during the period stated in the Petition and that it requested only the renewal of contracts for existing staff whose contracts were expiring where the 1st Respondent conducted suitability tests for all staff whose contracts were to be renewed.
26. It is the 2nd Respondent's contention that the process was conducted lawfully, and all employees were accorded equal opportunity.
27. In its Grounds of Opposition dated 15th May 2024, the 3rd Respondent opposed the Petition on grounds that:-
- i. The petition is incurable defective, misconceived, frivolous, incompetent and an abuse of the court process as the same is untenable and devoid of substance and full of misrepresentations of facts tailored to hoodwink this Honorable Court.

- ii. The petition is incurable defective , misconceived, frivolous, incompetent and an abuse of the court process as this court has no jurisdiction to entertain the petition in the 1st instance.
- iii. The petition offends the provisions of Article 234(2)(i) of the constitution as read with section 77 of the County Governments Act, section 85,86,87(2) and 88 of the Public Service Commission Act and section 9(2) and (3) of the Fair Administrative Action Act as the petitioner has failed or neglected to exhaust the available dispute resolution mechanism provided therein
- iv. The petition offends the doctrine of exhaustion and constitution avoidance by failing or neglecting to adhere to internal dispute resolution mechanisms provided by section 77 of the County Governments Act, Section 86 and 87(2) of the Public Service Commission Act to this Honorable court.
- v. The Petitioner has failed to plead the alleged constitutional grievance with specificity as enunciated in the ***Anarita Karimi Njeru Vs Republic (1979) eKLR***
- vi. The petition does not raise any cause of action against the 3rd Respondent and the same amounts to a fishing

expedition mission intended to paint the Office of the 3rd Respondent in bad light.

vii. The petition offends the provisions of Rule 10 (2) (d) of the constitution of Kenya (protection of rights and fundamental freedoms) Practice And Procedure Rules,2013 to the extent that it does not disclose the injury caused to the Petitioner ,public, class of persons or the community.

viii. The petition is otherwise incompetent ,misconceived, misplaced and is an abuse of the process of this Honorable Court as the Petitioners rights and fundamental freedoms have not been breached or infringed in any manner as alleged or at all and the same ought to be struck out with costs to the Respondents herein.

28. In sum, the Respondents urged the court to dismiss the Petition with costs.

29. The Petition was disposed of by way of written submissions which was duly filed by the Respondents. The Petitioner opted not to file submissions.

The Respondents' submissions

30. In their submissions dated 10th May 2025, the Respondents framed the issues for submissions to be:-
- i. Whether this court has jurisdiction to hear and determine this petition
 - ii. Whether the Petition as is competent
 - iii. Whether the orders sought can be granted
 - iv. Who bears the costs of the Petition.
31. On the first issue, the Respondents, citing section 77 of the County Governments Act and section 87(2) of the Public Service Commission Act, averred that the Petitioner's grievance falls within the exclusive jurisdiction of the Public Service Commission.
32. The Respondents further submit that, under the doctrine of constitutional avoidance, this Court's jurisdiction to entertain a constitutional petition is limited where alternative statutory dispute resolution mechanisms exist.
33. It is submitted that no exceptional circumstances exist to warrant exemption from the requirement of exhaustion of the available statutory remedies or from the application of the constitutional avoidance doctrine.

34. The Respondents maintain that the jurisdiction of this Court has been prematurely invoked, and therefore the Petition should be struck out with costs to the individual Respondents.
35. According to the Respondents, the doctrine of constitutional avoidance limits the jurisdiction of this court to entertain a constitutional petition where there exists alternative dispute resolution mechanism.
36. It is submitted that there is no exceptional circumstances to warrant exemption from exhaustion or constitutional avoidance doctrine.
37. The Respondents maintained that the jurisdiction of this court has been prematurely invoked and that as such, the Petition should be struck out with costs to the individual Respondents.
38. On the second issue, the Respondents, relying on the case of ***Anarita Karimi Njeru vs Republic (1979) eKLR***, averred that the Petitioner has not specified with precision the constitutional provisions and statutory provisions alleged to have been violated, nor how such violations occurred.
39. The Respondents submit that a general reference to a particular period is insufficient, and that the Petitioner ought to have provided particulars of each individual said to have

been recruited or appointed in contravention of the Constitution.

40. In support of the 2nd Respondent's contention regarding locus standi, the Respondents submit that the relationship between employees and the 2nd Respondent falls within the private law domain, not public law.
41. On this basis, the Respondents contend that the recruitment or appointment of any person gives rise to a private law contract, and therefore the Petitioner lacks locus standi to institute the present petition.
42. On the issue of whether the orders sought can be granted, the Respondents submit that no new recruitments occurred during the period under review; only contract renewals were effected based on satisfactory performance.
43. The 1st Respondent has maintained that the Petitioner has not discharged the burden of proving the existence of any alleged infringement of constitutional rights
44. In response to the Petitioner's allegation regarding the constitution of the 1st Respondent, the Respondents aver that the Board was duly constituted in accordance with section 58 of the County Governments Act. It is submitted that the Governor appointed a Chairperson and five members.

Following the resignation of the Chairperson and one member, the Board consisted of four members, one of whom, the Vice Chair, assumed the responsibilities of the Chair. Additionally, CS Jeruto Nancy was appointed as Acting Secretary and Chief Executive Officer pending the substantive filling of the position, thereby ensuring that the Board comprised five members as required under section 58 of the Act.

45. Lastly on the issue of costs, the Respondents contend that the petition is an abuse of the court process, and should be dismissed and costs awarded to the Respondents.

Analysis and Determination

46. I have considered the Petition, the rival affidavits, the Grounds of Opposition and the submissions on record. The issues that fall for this court's determination are:-
 - i. Whether the recruitment and/or appointment processes conducted by the Respondents between 1st January 2023 and 1st March 2024 were lawful, constitutional, and in accordance with relevant statutes.

- ii. Whether the Petitioner is entitled to the declaratory and mandatory orders sought, including orders of certiorari and mandamus.
- iii. What reliefs should issue

Whether the recruitment and/or appointment processes conducted by the Respondents between 1st January 2023 and 1st March 2024 were lawful, constitutional, and in accordance with relevant statutes.

47. The Petitioner contends that between 1st January 2023 and 1st March 2024, the Respondents purportedly employed over 1,500 individuals without adherence to competitive recruitment procedures, resulting in a breach of constitutional principles, including transparency, equity, inclusiveness, and good governance. The Petitioner further alleges that the 1st Respondent was not properly constituted and lacked the quorum required to make lawful appointments rendering the recruitments ultra vires.
48. The Respondents, on the other hand, assert that no new appointments were made during the period in question. They contend that what occurred were renewals of contracts for officers whose terms were expiring which renewals were

based on satisfactory performance and departmental needs. The Respondents averred that all appointments were carried out in accordance with the Constitution, the County Governments Act, the Public Service Commission Act and relevant schemes of service.

49. In support of their position, the Respondents state that the staff whose contracts were renewed had been competitively recruited earlier, and no complaints regarding the recruitment process were ever lodged with the Public Service Commission or any court of competent jurisdiction.
50. The Respondents maintained that recruitment of officers on contract does not require external advertisement, as such appointments are for contractual renewal and continuation of ongoing departmental functions.
51. From the evidence on record, the Petitioner has not provided particulars of each individual recruited or appointed outside the statutory framework. In addition, no evidence was presented demonstrating that the renewed contracts violated the Constitution or relevant statutes. Moreover, the Respondents provided credible evidence that the 1st Respondent was duly constituted, with the Chairperson, Vice

Chair, and Acting Secretary in place, ensuring quorum and authority to carry out recruitment and contract renewals.

52. The law requires that recruitment to the County Public Service must comply with Article 232 of the Constitution and relevant statutory provisions, including sections 65 and 66 of the County Governments Act. However, the law also recognizes contract renewals based on satisfactory performance and departmental needs. In the absence of evidence to the contrary, contract renewals do not constitute new appointments that breach constitutional or statutory requirements.
53. On the composition of the CPSB, section 58 of the County Governments Act provides:

Composition of the County Public Service Board

(1) The County Public Service Board shall comprise—

(a) a chairperson appointed in accordance with section 58A;

(b) at least three but not more than five members appointed in accordance with section 58A;

(c) a certified public secretary of good professional standing nominated and appointed by the governor, with the approval of the county assembly, who shall be the secretary to the board.

54. As stated in the affidavit of CS Jeruto, the then Acting Chief Executive Officer and Secretary to the Board, the Board had a chairperson and 3 members at the time material to this case and was therefore properly constituted.

55. I therefore find that the Petitioner did not prove that the recruitment and/or contract renewal processes undertaken by the Respondents between 1st January 2023 and 1st March 2024 were unlawfully and or unconstitutionally conducted in violation of the Constitution and relevant statutes, or that the Respondents contravened any principles of equity, transparency, or good governance.

Whether the Petitioner is entitled to the declaratory and mandatory orders sought, including orders of certiorari and mandamus.

56. The law is settled that the grant of declaratory, certiorari, and mandamus orders is discretionary and depends on the

Petitioner demonstrating a clear violation of law, abuse of office, or failure to perform a statutory duty.

57. The Respondents acted within their constitutional and statutory mandate. No evidence of ultra vires conduct, abuse of office, or failure to perform statutory duties was adduced.
58. Consequently, the Petitioner has not established any basis for the grant of declaratory reliefs or orders of certiorari or mandamus.

Reliefs

59. Having found that the Petition is without merit, the Petitioner is not entitled to the reliefs sought.
60. In the circumstances, the Petition is dismissed in its entirety. Given the public interest nature of the matter, each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON
THIS 4TH DAY OF DECEMBER, 2025**

**MAUREEN ONYANGO
JUDGE**