Arati & 4 others v Omao & 4 others (Civil Appeal E101 of 2024)
[2024] KECA 1421 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1421 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL E101 OF 2024

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

OCTOBER 11, 2024

BETWEEN

HON. PAUL SIMBA ARATI, GOVERNOR, COUNTY GOVERNMENT OF KISII ..... 1ST APPELLANT

COUNTY GOVERNMENT OF KISII ..... 2ND APPELLANT

COUNTY SECRETARY, KISII COUNTY ..... 3RD APPELLANT

KISII COUNTY PUBLIC SERVICE BOARD ..... 4TH APPELLANT

ALFRED ONGIRI NYANDIEKA ..... 5TH APPELLANT

AND

VINCENT MARIITA OMAO ..... 1ST RESPONDENT

DAVID MANGONDI SENEMA ..... 2ND RESPONDENT

THE CLERK, KISII COUNTY ASSEMBLY ..... 3RD RESPONDENT

THE SPEAKER, KISII COUNTY ASSEMBLY ..... 4TH RESPONDENT

KISII COUNTY ASSEMBLY ..... 5TH RESPONDENT

(Being an Appeal from the Judgment of the Employment and Labour Relations Court at Kisumu, (Radido, J.) dated 24th January, 2024 in ELRC Petition No. E014 of 2023)

Governors not required to publicly advertise and competitively recruit County Attorneys.
The core issue of the appeal was whether Governors were mandated to advertise and competitively recruit County Attorneys. The appellants contended that the Office of the County Attorney Act granted Governors discretion to appoint County Attorneys without public advertisement. They also argued that the ELRC erred in hearing the case after finding the petitioners had failed to prosecute it by not submitting submissions on time. The Court of Appeal held that the Office of the County Attorney Act did not require competitive recruitment for County Attorneys.

The CoA also found that the ELRC erred by proceeding with the case despite the petitioners' procedural lapse. Consequently, the appeal was allowed, and the ELRC decision was overturned.

Reported by John Ribia

Devolution *– County Executive – powers – powers of the Governor – powers to hire the County Attorney – preconditions – competitive recruitment - whether Governors were required to publicly advertise and competitively recruit County Attorneys - Public Appointments (County Assemblies Approval) Act (Cap 265B) section 5(1).*

Civil Practice and Procedure *– petitions – prosecution of petitions – failure to file submissions – where one was deemed to have failed to prosecute a case by failing to file submissions - whether the Employment and Labour Relations Court erred by proceeding with the hearing and ruling on the merits of the petition after finding that the petitioners had failed to prosecute their case by not filing submissions within the directed time.*

Brief facts

The Governor Paul Simba Arati appointed Alfred Ongiri Nyandieka as the County Attorney of Kisii County through Gazette Notice No. 14717 on November 30, 2022, following nomination and vetting by the County Assembly. The appointment process did not involve public advertisement or competitive recruitment. Subsequently, Vincent Mariita Omao and David Mangondi Senema filed a petition in the Employment and Labour Relations Court (ELRC) challenging the appointment, citing procedural and constitutional violations.

The Employment and Labour Relations Court ruled that the appointment was unlawful due to the lack of competitive recruitment and quashed it. The appellants, including the Governor and the Kisii County Government, appealed the decision, arguing that the County Attorney's appointment did not require advertisement or competitive recruitment, citing the Office of the County Attorney Act.

Issues

i. Whether Governors were required to publicly advertise and competitively recruit County Attorneys.
ii. Whether the Employment and Labour Relations Court erred by proceeding with the hearing and ruling on the merits of the petition after finding that the petitioners had failed to prosecute their case by not filing submissions within the directed time.

Held

1. The first appellate court's mandate was to review issues of both facts and law afresh and come to its own independent conclusions.
2. The provisions of section 5(1) of the Public Appointments (County Assemblies Approval) Act did not import notions of competitive recruitment unless the statute specifically provided so. The trial court was in error. Section 5(1) merely dealt with the procedure for vetting before the County Assembly and did not come with substantive requirements regarding the recruitment process itself.
3. The Public Appointments (County Assemblies Approval) Act was plain to read. When a statute spoke plainly on an issue especially on an issue related to devolution, it was best that courts retained fealty to the legislative intention. That would be the best way to achieve the objects of devolution as outlined in article 174 of the Constitution. The Act granted discretion to a County Executive to appoint the County Attorney which was analogous to the discretion given the country's President to select the Attorney General. It was inimical to devolution to go in search of more pre-conditions to be met before the exercise of such discretion by the County Executive.
4. It was not open for a trial court to consider a petition after it had concluded that the 1st and 2nd respondents had abandoned it by failing to file submissions as directed by the court. It was improper to do so without at least without giving the appellants an opportunity to be heard on the question.
5. The trial court reached the factual conclusion that the 1st and 2nd respondents had not prosecuted their amended petition by their failure to file submissions timeously. At the very least, the trial court ought to have permitted the appellants to address him on the question on what notions of substantive justice were at play in the case.

Appeal allowed.

Orders

1st and 2nd appellants to pay the costs of appeal to the appellants and to the 3rd, 4th, and 5th respondents.

Citations

Cases

Kenya

County Government of Vihiga v Evans Muswahili Ladtema & 3 others Civil Appeal No 53 of 2021 - (Applied)

Regional Court

Selle v Associated Motor Boat Co Limited [1968] EA 123 - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 10, 27, 35(1)(b)(2); 36(1); 47; 50(1)(2); 174(h); 185(3); 232; Chapter 6- (Interpreted)
2. Office of the County Attorney Act (cap 265E) section 5(1)- (Interpreted)
3. Public Appointments (County Assemblies Approval) Act (cap 265B) sections 5, 8(a) - (Interpreted)

Advocates

Mr Oronga, *Mr Mungu* and *Mr Theuri* for the appellants

Mr Ochoki for the 1st and 2nd respondents

Mr Onserio and *Mr. Ochieng Oginga* for the 3rd, 4th and 5th respondents

JUDGMENT

1. The singular substantive issue presented in this appeal is whether Governors are required to advertise and competitively recruit County Attorneys under the provisions of the law. There is a secondary question whether the petition in the trial court should have been treated as abandoned for the reason that the petitioners in the case failed to prosecute by failing to file submissions as directed by the trial court. In the current case, the trial court went ahead to determine the case anyway; and the appellants argue that that was improper use of judicial discretion which impermissibly impinged on their procedural due process.

2. The facts in the appeal are short and undisputed. They are as follows.

3. Governor Paul Simba Arati (the Governor of Kisii) gazetted the appointment of Alfred Ongiri Nyandieka (the 5th appellant) as the County Attorney, Kisii through Gazette Notice No 14717 on November 30, 2022.

4. This was after the Governor had nominated the 5th appellant on 15th November, 2022. After the nomination, the Governor sent the name of the 5th appellant to the Speaker of the Kisii County Assembly for vetting and approval by the County Assembly. The Clerk of the County Assembly caused to be published in the Daily Nation newspaper on November 17, 2022 a notice inviting comments from the public and scheduled a vetting date of November 25, 2022.

5. The 5th appellant was duly vetted on that day and a favourable report submitted to the County Assembly. The County Assembly adopted the report on November 29, 2022. The Speaker

communicated the approval to the Governor who subsequently gazetted the name of the 5th appellant as aforesaid and issued him with an appointment letter on December 1, 2022.

6. Unfortunately, that did not end matters. Five months later, a petition was brought by the 1st and 2nd respondents before the Kisumu Employment and Labour Relations Court challenging the appointment in the Amended Petition dated May 24, 2023, in which they sought the following reliefs as reproduced verbatim:

    i. A declaration that the 1st respondent's purported appointment of the Interested Party is substantively and procedurally non- compliant with due process as set in statutory and constitutional provisions.

    ii. An order of certiorari quashing the 1st respondent's decision purporting to summarily appoint the interested party as County Attorney of the Kisii County Government.

    iii. A declaration that the 1st respondent failed to observe the national values and principles of governance as set out in article 10 and article 185(3) of the *Constitution* in the manner they handled the recruitment of the Interested Party.

    iv. A declaration that the said appointment of the Interested Party herein, Alfred Ongiri Nyandieka by the 1st respondent was irregular and unprocedural (*sic*) was in breach of Article 47 of the *Constitution of Kenya*.

    v. A declaration that the actions of the 1st respondent in this cause violated the Constitutional provisions under article 27, 35(1)(b) and (2), 36(1), 47, 50(1), and (2) of the *Constitution of Kenya*.

    vi. An order compelling the Interested Party to refund the salaries, remuneration, and personal emoluments expended during the illegal tenure.

    vii. This Honourable Court do order that the costs of this Petition be borne by the 1st respondent.

    viii. Such other orders as this Honourable Court shall deem fit and just to grant in the circumstances.

7. The nature of the reliefs sought clearly disclose the basis upon which the 1st and 2nd respondents believed they were entitled to them. In short, the 1st and 2nd respondents believed that the appointment of the 5th respondent should have been preceeded by advertisement and competitive recruitment carried out by the County Service Board. They also believed that the approval by the County Assembly fell short of the constitutional legal requirements of public participation.

8. The appellants opposed the Amended Petition at the trial court. On record is an affidavit filed by the County Secretary and Head of the Public Service in opposition to a motion for interim relief which had accompanied the initial Petition and the Petition on May 25, 2023. This was filed on behalf of the 1st, 2nd and 3rd appellants. There is also a replying affidavit sworn by the acting Clerk, Kisii County Assembly in opposition to the Amended Petition. It is filed on behalf of the 3rd, 4th and 5th respondents herein. The 4th appellant filed a replying affidavit on June 9, 2023 deponed by one Judy Omare Nyakerario; and another one on June 12, 2023.

9. After some procedural skirmishes regarding representation were out of the way, the trial court gave directions on hearing of the Amended Petition on October 4, 2023. They were basically that:

    i. The respondents who had not responded to the Amended Petition to file and serve responses on or before October 19, 2023.

ii. The petitioners to file and serve any further affidavit together with submissions on or before November 3, 2023.

iii. The respondents and interested party to file and serve submissions on or before November 24, 2023.

iv. Judgment on November 29, 2023.

10. It would appear that by November 29, 2023, the 1st and 2nd respondents, who were to trigger the other parties by filing their submissions as the petitioners, were yet to do so. Only the 3rd, 4th and 5th respondents had filed submissions by then. However, the 1st respondent was present in court in person and beseeched the court to be permitted time to reach his advocate. The trial court rescheduled the judgment date to January 24, 2024. In doing so, the learned judge indicated that he would address the question of the failure of the 1st and 2nd respondents to file submissions in his final judgment. It would appear that the 1st and 2nd respondents finally filed their submissions on January 8, 2024.

11. Naturally, this was the first question the learned judgedealt with. He rendered himself thus:

> "The parties suggested on October 4, 2023, and the court agreed that the Petition be determined on the basis of the record and submissions to be filed and exchanged.
>
> Consequently, the court directed the parties starting with the petitioners to file and serve their submissions on or before November 3, 2023. The petitionersdid not comply with the order.
>
> By failing to file and serve the submissions as directed, it appears the petitioners were abandoning the Petition and frustrating the expeditious and proportionate determination of the Petition. In essence, they failed to prosecute the Petition and on that ground, the court is of the view that the Petition should have been rejected or relief declined but will not in the interest of substantive justice."

12. With that disposition on the question of prosecution of the Amended Petition, the learned judge then turned to the substantive matters. The learned judge proceeded to find merit on the Amended Petition on a single ground: that the 5th appellant was not subjected to competitive recruitment. The learned judge reasoned as follows:

> "It is not in dispute that the Governor did not publicly advertise the position of the County Attorney before settling on the interested party.....
>
> In the instant case, there was no explanation from the Governor or other respondents how the interested party ended up being the nominee for the position of the County Attorney.
>
> The nomination of the interested party therefore failed the threshold expected by sections 5(1) and 8(a) of the *Public Appointments (County Assemblies Approval) Act*."

13. The learned judgeproceeded to issue a

> "declaration .....that the appointment of the interested party [the 5th appellant] as the County Attorney was procedurally non-compliant with the provisions of sections 5(1) and 8(a) of the *Public Appointments (County Assemblies Approval) Act*."

It, therefore, ordered for the quashing of the appointment.

14. This is what has set the stage for the present appeal. The appellants are aggrieved by the decision and orders of the learned judgeand have raised six grounds of appeal as follows:

    a. That the learned judge erred in law and fact in entertaining and considering the Petition on merits or otherwise, despite making a finding that the petitionershad abandoned the same and failed to prosecute it.

    b. That the learned judge erred in law and fact in reading into section 5(1) of the *Office of the County Attorney Act* by imposing pre-conditions on the Governor, and imposing the general mandatory duty to advertise all public positions, despite holding that the provision does not prescribe how the Governor should identify a qualified person for appointment.

    c. That the learned judge erred in law and fact in his interpretation of article 10 and 232 of the *Constitution* on the principles in light of the express provisions of sections 5 (1) of the *Office of the County Attorney Act* which gives the Governor the discretion of appointing a County Attorney.

    d. That the learned judge erred in law and fact and misapprehended the principles of statutory and constitutional interpretation and application and thereby arriving at a wrong decision.

    e. That the learned judge erred in his interpretation and application of the *Constitution* vis-à-vis determining the appointment of the County Attorney by failing to take into account the objects of devolution specifically under Article 174 (h) of the *Constitution of Kenya, 2010* as read with article 27 of the *Constitution of Kenya, 2010* in facilitating the decentralization of state organs, their functions and services, with regard to the office of Attorney General.

    f. That the learned judge erred in law in failing to uphold the doctrine of precedent and in particular in failing to consider the binding precedent in the decision in Kisumu Civil Appeal No 53 of 2021, *County Government of Vihiga v Evans Muswahili Ladtema and 3 others*.

15. The appeal is opposed by the 1st and 2nd respondents who support the positions taken by the trial court. The 3rd, 4th and 5th respondents support the appeal.

16. All the appellants and respondents filed written submissions as directed by the court. During the plenary hearing of the appeal, Mr Oronga, Mr Mungu and Mr Theuri appeared together for appellants; Mr Ochoki appeared for the 1st and 2nd respondents; while Mr Onserio and Mr. Ochieng Oginga appeared together for the 3rd, 4th and 5th respondents. All the learned counsel adopted their filed submissions and provided brief oral highlights.

17. As described above, we have perused and analyzed the record as we should as the first appellate court, whereby our mandate is to review issues of both facts and law afresh and come to our own independent conclusions. (See *Selle v Associated Motor Boat Co Limited* [1968] EA 123).

18. We have also keenly read the filed submissions and the very useful case digests provided by the parties. As raised at the beginning of this judgment, in our discernment, the appeal raises twin issues for consideration – one procedural; the other substantive.

19. We will reverse and begin with the substantive question. In our view, the question presented is plain: Are Governors required to publicly advertise and competitively recruit County Attorneys under the provisions of the law?

20. The appellants and the 3rd, 4th and 5th respondents say that there is no requirement for advertisement and competitive recruitment; that, instead, the recruitment of County Attorney is covered under

section 5 of the *County Attorney Act, 2020* which gives the Governor wide discretion to do the appointment; that the learned judge was wrong to import pre-conditions on Governors in his reading of the *County Attorney Act*; that the learned judge was in error in his statutory interpretation; and, finally, that the learned judge was in fundamental error for failing to follow the doctrine of precedent since there was a binding decision of this court on the question and it was not up to him to depart from it. The precedent in question is Kisumu Civil Appeal No. 53 of 2021, *County Government of Vihiga v Evans Muswahili Ladtema and 3 others* (hereinafter, Evans Muswahili case)

21. On the other hand, the 1st and 2nd respondents argue that the appellants fundamentally misunderstood their Amended Petition since it was not based only on the *County Attorneys Act* but on the provisions of the *County Attorneys Act* as read together with the *Public Appointments (County Assemblies Approval) Act* as well as existing constitutional provisions especially article 10 and 232 of the *Constitution*. All those read together, they insist, yield the position that the appointment of a County Attorney must be competitively recruited. They further argue that the *Evans Muswahili* case is distinguishable from the case that was before the learned judge. This was because, they argue, the *Evans Muswahili* case dealt solely with the question of advertisement but this case was particularly regarding compliance with the *Public Appointments (County Assemblies Approval) Act*.

22. In paragraph 12 of this judgment, we have reproduced how the learned judge framed the question before him and how he disposed of it. Two things are clear from the learned judge's framing of the issue. The first one is that, contrary to the arguments by the 1st and 2nd respondents, the learned judge viewed the question before him predominantly as one involving the question whether the Governor was required to advertise and competitively recruit for the position of County Attorney. The second issue that becomes clear from the learned judge's framing as well as from a structural reading of the whole judgment is that the learned judge comes to the view that such competitive recruitment was needed because while the *County Attorney Act* is silent, the *Public Appointments (Count Assemblies Approval) Act* as read with article 10 and 232 of the *Constitution* would yield the conclusion that such competitive recruitment was required.

23. The question, therefore, is whether the learned judge was correct in that view. We have concluded that he was not for at least three reasons.

24. First, as the appellants correctly argue, the learned judge was bound by precedent on this question. Despite attempts by the 1st and 2nd respondents to finely parse the *Evans Muswahili* case, there is no doubt that the issue before the court was precisely the question that is before this court: do the provisions of the law provide for the competitive recruitment of County Attorneys by Governors? Both the leading judgment by Kiage, JA and the concurring one by Jamila Mohamed, JA, are unmistakable in their tenor. We find necessary to quote in extenso from the lead judgment of Kiage, JA who analyzes the issue thus:

> "Moreover, considering that the Office of the County Attorney Act was enacted some three years after the *Public Appointments (County Assemblies Approval) Act* by the same Parliament, it must follow, as a matter of course, that the provisions of the former must prevail in the event of any inconsistency which, in my view, does not exist and can only be, at best, more apparent than real. Decisively, however, again on first principles, in so far as the *Office of the County Attorney Act* does not impose an obligation for advertisement and competitive filing of the position of County Attorney, its specific and particular provisions must prevail over any seeming contrary or inconsistent provision in a general statute, which the *Public Appointments (County Assemblies Approval) Act* would be in the present context.

The matter is placed beyond argument by a comparison between the appointment of a County Attorney under section 5 of the relevant *Act*, which does not require advertisement, and the appointment of his/her principal assistant, the County Solicitor, under section 17 of the same statute, for which there must be competitive recruitment. The latter section provides in relevant part as follows:

> " 17(1) There shall be a County Solicitor General who shall be competitively recruited and appointed by the County Public Service Board"

It seems to me quite clear beyond peradventure that the position of the County Attorney, just like that of the Attorney General in the case of the National Government, as the principal legal adviser and a member of the executive to the particular level of government, is appointed at the sole discretion of the head of the Executive. The Governor, just like the President with respect to the Attorney General, is not required to advertise for the position of County Attorney. It is at his discretion, with accountability limited to the qualifications set out in section 5(2) of the *Act* that the person be an Advocate of the High Court of Kenya of at least 5 years standing, and compliance with Chapter 6 of the *Constitution*. Public participation and acceptability are then ensured by the vetting process and approval by the County Assembly preceding appointment, as in fact happened in the case of Musiega.

It is plain to see that had Parliament intended that the County Attorney's position was to be filed competitively by the Governor inviting applications through advertisement, nothing would have been easier than for it to have said so in the statute. That it did not do so means, as it can only mean, that it never intended that there be such a process. I am persuaded that where the text is clear in its provisions as is the statutory provision under consideration, courts must give the words it employs their ordinary meaning."

25. On her part, J Mohammed, JA perspicaciously writes:

> " (38) I find that this is the correct interpretation of section 5 (1) of the *Office of the County Attorney Act*. The appointment of the County Executive Committee members such as the County Attorney does not require advertisement. Accordingly, in the instant appeal, the appointment of the County Attorney was at the sole discretion of the Governor and did not require advertisement.
>
> (39) With due respect, the learned judge erred by relying on section 5(1) of the *Public Appointments (County Assemblies Approval) Act* provisions as it is only applicable where the nomination of a candidate requires advertisement. The provision is therefore not applicable in the appointment of a County Attorney."

26. This paragraph by J Mohammed, JA is particularly important because it completely deals with the argument the 1st and 2nd respondents have attempted to raise before us that a petition on the same question that is pleaded solely based on section 5(1) of the *Public Appointments (County Assemblies Approval) Act* should somehow fare differently. J Mohammed, JA puts that argument completely away by making it clear that the provisions of section 5(1) of the *Public Appointments (County Assemblies Approval) Act* do not necessarily import notions of competitive recruitment unless that statute specifically says so. In our view, this is the second reason why the learned Judge in this case was in error in reaching the conclusion that he did. The provisions of section 5(1) of the *Public*

Appointments (County Assemblies Approval) Act merely deal with the procedure for vetting before the County Assembly and do not come with substantive requirements regarding the recruitment process itself. It is important to point out at this juncture that the learned Judge, upon analysis, found no procedural infirmities in the vetting and approval process before the County Assembly.

27. It requires no belabouring that once this court has pronounced itself on an issue, the Employment and Labour Court and all lower courts are bound by that decision. In the present case, the question before the court was on all fours to the facts in *Evans Muswahili* case and the learned judge made no attempts to distinguish the case at hand to the binding decision.

28. Finally, we think the learned judge was in error because the statute that was before him was plain to read as Kiage, JA points out above. When a statute has spoken plainly on an issue especially on an issue related to devolution, it is best that courts retain fealty to the legislative intention. That would be the best way to achieve the objects of devolution as outlined in article 174 of the *Constitution*. In this case, the statute in question, as the judgment of Kiage, JA in *Evans Muswahili* case makes clear, granted discretion to a County Executive to appoint the County Attorney which is analogous to the discretion given the Country's President to select the Attorney General. It seems inimical to devolution to go in search of more pre-conditions to be met before the exercise of such discretion by the County Executive.

29. We finally turn to the issue of procedural due process. The question is whether, in the circumstances of this case, it was open for the learned judge to consider the Amended Petition after he had concluded that the 1st and 2nd respondents had abandoned it by failing to file submissions as directed by the court.

30. The appellants argue, naturally, that it was not open for the learned judge to so act. The 1st and 2nd respondents remained curiously silent in their submissions on this point.

31. In the particular circumstances of this case, we think it was improper for the learned judge to have proceeded as he did – at least without giving the appellants an opportunity to be heard on the question. The learned judge reached the factual conclusion that the 1st and 2nd respondents had not prosecuted their Amended Petition by their failure to file submissions timeously. At the very least, the learned judge ought to have permitted the appellants to address him on the question on what notions of "substantive justice" were at play in the case.

32. In any event, we have already made our determination on the substantive issue. The upshot is that this appeal is for allowing and we hereby do so. The 1st and 2nd appellants shall pay the costs of the appeal to the appellants and to the 3rd, 4th and 5th respondents.

33. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF OCTOBER, 2024.

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HANNAH OKWENGU

JUDGE OF APPEAL

.....

H. A. OMONDI

JUDGE OF APPEAL

.....

JOEL NGUGI

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR