



**Hussein v Governor, County Government of Mandera & 2 others; Hassan (Interested Party) (Petition 215 of 2023) [2025] KEELRC 479 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 479 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION 215 OF 2023**

**B ONGAYA, J**

**FEBRUARY 21, 2025**

**IN THE MATTER OF THE ALLEGED VIOLATION OF ARTICLES 1, 2(1), 3(1), 10(1) (2), 22, 23, 27(1) (2), 73, 232 AND 258 OF THE CONSTITUTION OF KENYA.**

**AND**

**IN THE MATTER OF SECTIONS 7(8) AND 8 OF THE PUBLIC APPOINTMENTS (COUNTY ASSEMBLIES APPROVAL) ACT NO. 5 OF 2017**

**AND**

**IN THE MATTER OF SECTION 44 OF THE COUNTY GOVERNMENT ACT, 2012**

**AND**

**IN THE MATTER OF THE ILLEGAL APPOINTMENT OF BILLOW ISSACK HASSAN AS THE COUNTY SECRETARY, COUNTY GOVERNMENT OF MANDERA**

**AND**

**IN THE MATTER OF THE EXERCISE OF CONSTITUTIONAL & STATUTORY POWERS BY THE COUNTY GOVERNOR & COUNTY ASSEMBLY**

**BETWEEN**

**SADAM MAALIM HUSSEIN ..... PETITIONER**

**AND**

**THE GOVERNOR, COUNTY GOVERNMENT OF MANDERA ... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF MANDERA ..... 2<sup>ND</sup> RESPONDENT**

**THE COUNTY ASSEMBLY, COUNTY GOVERNMENT OF MANDERA ..... 3<sup>RD</sup> RESPONDENT**

**AND**



*(Before Hon. Justice Byram Ongaya on Friday 21<sup>st</sup> February, 2025)*

**JUDGMENT**

1. The petitioner filed the petition dated 28.10.2023 through Kusow & Company Advocates and prayed that:
  - a. A declaration be and is hereby issued under Article 73 and 232(g) of *the Constitution*, section 44(2) (c) and (d) of the County Government Act and sections 7(8) and 8(c) of the Public Appointments (County Assemblies Approvals) Act, 2017, the respondents were under a duty, and have failed, to have regard to competence and suitability, experience and qualities, merit and ability when making the nomination, approval and appointment of the interested party as the County Secretary.
  - b. A declaration be and is hereby issued that the interested party was and is unqualified for nomination as County Secretary and his subsequent approval and appointment by the respondents is thus unconstitutional, illegal and null and void ab initio as he did not attain the mandatory 10 years' experience under section 44(2) (c) and (d) of the County Government Act as at the time of nomination and appointment.
  - c. An Order of Judicial Review of Certiorari be and is hereby issued quashing the appointment of the interested party as the County Secretary, County Government of Mandera.
  - d. An Order do issue directing the respondents to take steps to ensure that regard be given to competence and suitability, experience and qualities, merit and ability when making fresh nomination, approval and appointment of the County Secretary.
  - e. An Order of Mandamus do issue compelling the interested party to refund all monies received from the 2<sup>nd</sup> respondent in the form of salaries, benefits and allowances forthwith for the entire duration he was the County Secretary and in even within 90 days.
  - f. Costs of this petition.
2. The petition is supported by the petitioner's affidavit sworn on 28.10.2023 in which he averred as follows:
  - i. The petitioner has locus standi to bring this petition in the interest of the public under Articles 3, 22 and 258 of *the Constitution* of Kenya.
  - ii. On 26.09.2022, the 2<sup>nd</sup> respondent advertised for inter alia, the position of County Secretary. On 14.10.2022 and vide an undated letter, the 1<sup>st</sup> respondent nominated County Executive Committee members and further nominated Billow Issack Hassan (interested party herein) as the County Secretary of the 2<sup>nd</sup> respondent. Later, the interested party was approved and appointed the County Secretary on 07.11.2022.
  - iii. When the 3<sup>rd</sup> respondent received the list of the nominees from the 1<sup>st</sup> respondent, it invited the public vide a notice posted on the Daily Nation Newspaper dated 20.10.2022 to submit any information or memoranda on the suitability of any of the candidates for appointment to the respective portfolio on or before 26.10.2022. The petitioner subsequently served the



3<sup>rd</sup> respondent a memorandum or statement on 24.10.2022 objecting to the interested party's approval as the County Secretary and noting his lack of qualification. However, the 3<sup>rd</sup> respondent refused and failed to consider the petitioner's objection during the vetting and approval hearing of the interested party. The interested party was consequently approved and later appointed by the 1<sup>st</sup> respondent on 07.11.2022.

- iv. The nomination, approval and appointment of the interested party by the respondents is illegal, unlawful and null and void ab initio as it falls short of the constitutional and statutory muster. In this regard, the interested party is not qualified for appointment to the position of County Secretary because he had not obtained the mandatory 10 years relevant professional experience alluded to under section 44(2) (c) of the County Government Act. That any experience founded on the void reinstatement of the interested party from his previous employment position is incurably bad and cannot be computed in favour of the interested party. Further, the interested party lacked the mandatory five (5) years' experience in a senior management level position set out in section 44(2) (d) of the County Government Act.
  - v. The interested party's appointment was thus actuated by ulterior motive, collusion and extraneous considerations including clan patronage. That his continued discharge of the mandate of the office of the County Secretary is unconstitutional and will result in loss of public money in terms of salaries, benefits and allowances. The petition should therefore be allowed in the interest of fairness and justice.
3. Further, the petitioner particularised the violation of *the Constitution* of Kenya as follows:
- i. The 1<sup>st</sup> respondent's deliberate exclusion of competent and qualified candidates for the County Secretary position on pretext that they did not have the right political backing and were not from the right clan, and instead nominating and appointing the interested party who was unqualified, is tantamount to denying others their right to equal benefit of the law and violating their right not to be discriminated against as stipulated under Article 27 of *the Constitution*.
  - ii. In nominating, approving and appointing the interested party who was not qualified for the position of County Secretary, the respondents breached their responsibility to be guided by competence and suitability, objectivity and impartiality in decision-making and allowed themselves to be guided by improper motive, in violation of Article 73(2) of *the Constitution* that is on responsibilities of leadership.
  - iii. The respondents failed to adhere to the values and principles of public service as set out in Article 232 of *the Constitution*. This is because in nominating, approving and appointing an unqualified candidate without the requisite 10 years' experience, the respondents were driven by extraneous factors and acted contrary to the values of transparency, accountability, fair competition and merit, which ought to be the basis of appointments.
4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' answer to the petition sworn by Hussein Adam Somo on 08.02.2024 was filed through Issa & Company Advocates. Mr. Somo, the County Attorney of the 2<sup>nd</sup> respondent, averred as follows:
- i. This Honourable Court lacks jurisdiction to entertain the prayer for certiorari quashing the appointment of the interested party as the County Secretary, County of Mandera County as the same is statute barred under section 9(3) of the Law Reforms Act.



- ii. Without prejudice to the foregoing, the 1<sup>st</sup> respondent nominated the interested party for the position of County Secretary on recommendation of a selection panel it duly constituted pursuant to section 44(2A) of the [County Governments Act](#). The 1<sup>st</sup> respondent then forwarded the interested party's name to the 3<sup>rd</sup> respondent by a letter dated 13.10.2022 for vetting and approval by the Assembly. Thereafter, the 3<sup>rd</sup> respondent notified the public that the approval hearing of the nominee for the position of County Secretary was set for 29.10.2022 at 9:30am.
- iii. Nobody, including the petitioner, presented any memorandum challenging the appointment of the interested party for consideration by the 3<sup>rd</sup> respondent, as confirmed at page 9 of the First Report of the Committee of Appointments of October 2022. Consequently, the 3<sup>rd</sup> respondent adopted the said report dated 31.10.2022 and approved the appointment of the interested party as the County Secretary. The 3<sup>rd</sup> respondent's Committee on Appointments observed that the nominees, including the interested party, "demonstrated knowledge, experience and ability to the dockets they were nominated for as well as requisite academic qualifications" and that "all the nominees satisfied the requirements of Chapter Six of [the Constitution](#)".
- iv. The purported memorandum produced by the petitioner as annexure "SM-4a" of his supporting affidavit is neither stamped nor acknowledged by the Office of the Clerk if submission was by hand delivery nor has the petitioner exhibited a delivery report if submission was by email.
- v. Thereafter, by a letter dated 03.11.2022, the 3<sup>rd</sup> respondent informed the 1<sup>st</sup> respondent of its decision approving the nomination of the interested party to the office of County Secretary and advised it to appoint him together with the other approved appointees.
- vi. The requirement under section 44(2)(c) of the [County Governments Act](#) is that the appointee to position of County Secretary ought to have "at least ten years relevant professional experience" and not ten years post-graduate experience as erroneously claimed by the petitioner. The interested party had attained cumulative relevant professional experience of 12 years, four (4) months as at the date of his appointment to County Secretary position. In any event, this Court has no jurisdiction to interrogate challenge on the recruitment and reinstatement of the interested party to the position of Principal Budget Officer that is not only overtaken by events but statute barred under section 90 of the [Employment Act](#).
- vii. Regarding the requirement for five (5) years' experience in a leadership position under section 44(2)(d), the interested party had a cumulative experience of seven (7) years between 08.10.2014 to May 2017 and 01.06.2018 to 07.11.2022 as the Principal Budget Officer and Head – Budget Analysis in the 3<sup>rd</sup> respondent. He was also selected as a fellow to the 2015 cohort of the Mandela Washington Fellowship Institute following a merit-based open competition with other exemplary applicants from across Africa. He was also conferred with the presidential award of Order of Grand Warrior (OGW) in recognition of his distinguished and outstanding services rendered to the nation in various capacities and responsibilities.
- viii. The allegations that the respondents violated [the Constitution](#), statute and procedural requirements in the appointment of the interested party to County Secretary position are therefore unsubstantiated. The petitioner had failed to disclose the extraneous factors that influenced the respondents in the appointment of the interested party to his position. As demonstrated in defence, the interested party's appointment adhered to the values of transparency and accountability and was based on merit.



- ix. The order seeking to compel the interested party to refund all monies received from the 2<sup>nd</sup> respondent does not lend itself as he has been in office and working from the time of his appointment and thus entitled to fair remuneration for work done under Article 41 of the Constitution.
5. The 3<sup>rd</sup> respondent filed a response to petition sworn by Ahmed H. Surow on 18.12.2023, through Hashim Mohamed Nur Adhan Advocate. The case was that the 3<sup>rd</sup> respondent carried out the vetting and approval hearing process for the interested party to the position of County Secretary, in line with sections 7 and 8 of the Public Appointments (County Assemblies Approval) Act, 2017. That the petitioner has engaged in acts of forgery and perjury by producing a purported sworn statement or memorandum that is fraudulent from the absence of an acknowledgment of receipt. In any event, records indicate that the email address "clerk@manderaassembly.go.ke" had only received a total of four (4) emails throughout the entire month of October 2022, and the petitioner never presented any memorandum to the County Assembly. It was therefore not in public interest to grant the prayers and declarations sought in the petition.
6. The interested party filed an answer to the petition sworn on 08.02.2024, through Issa & Company Advocates. He averred that he was unaware that the petitioner submitted a memorandum objecting to his appointment as County Secretary as alleged or by any other person. He noted that his appointment was approved after thorough vetting by the 3<sup>rd</sup> respondent's Committee on Appointments and reiterated his qualifications at the time of nomination and appointment to the said position as averred by the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein. The interested party noted that he also completed the 2014 Acumen East Africa Fellows Program, which is a rigorous leadership program. It was the interested party's case that he has carried out his mandate and selflessly served the people of Mandera County from the date of his appointment as County Secretary on 07.11.2022. That the instant petition is therefore misconceived, bad in law and lacks merit.
7. The petitioner testified in support of the petition, Hussein Adama Somo testified for the 1<sup>st</sup> and 2<sup>nd</sup> respondents while Billow Issack Hassan testified in person as the interested party.
8. The petitioner filed submissions dated 05.12.2024, the 1<sup>st</sup> and 2<sup>nd</sup> respondents and interested party filed their submissions dated 07.02.2025, and the 3<sup>rd</sup> respondent filed submissions dated 07.02.2025. The Court has considered the material on record and returns as follows'
9. To answer the 1<sup>st</sup> issue, the petitioner has failed to show that he delivered or served upon the 3<sup>rd</sup> respondent the alleged memorandum or statement objecting to the 3<sup>rd</sup> respondent's approval of the interested party for appointment to the position of County Secretary. The petitioner testified that he presented his memorandum of objection to the 3<sup>rd</sup> respondent on 24.10.2022 by email and confirmed that he had not exhibited a delivery receipt of the email. He also testified that his memorandum had not been sworn before a commissioner for oaths or a magistrate or a judge and it only had his signature. The 3<sup>rd</sup> respondent's public announcement inviting objections to nomination stated that the same was to be made by way of a sworn statement or affidavit accompanied by any documentary evidence. In the circumstances, the Court upholds the case as urged and submitted for the respondents that on a balance of probability the petitioner's objection to nomination of the interested party was never delivered to the 3<sup>rd</sup> respondent and it was not, in any event, in the prescribed form. The Court finds that the petition is barred by want of exhaustion of the prescribed statutory procedure for objecting to nominations. While finding that the petitioner has not established sufficient or any material evidence that shows that the interested party invariably lacked relevant experience as was alleged, the want of exhaustion of prescribed objection procedure and for no shown reason to comply with that statutory procedure bars the Court from delving into the merits of the alleged lack of requisite experience.



10. To answer the 2<sup>nd</sup> issue, the Court finds for the respondents that the indeed the petition was a mere afterthought filed after unexplained inordinate delay. The petitioner elaborately testified thus “...I became aware of interested party’s appointment as county secretary during his recruitment process. It was October 2022. In October 2022 I had not been appointed. He was formally appointed. I send a memo opposing his vetting. His formal appointment I opposed. I became aware of his appointment on 07.11.2022. Petition was filed on 28.10.2023. It was 11 months after I became aware of his appointment...” The Court considers that the delay was not excusable and it operates as a bar from granting the relief that would amount to setting aside the interested party’s appointment which had already taken effect long before the filing of the petition. The Court will not aid the indolent.
11. To answer the 3<sup>rd</sup> issue the Court finds for the respondents that the alleged constitutional violations and claims have not been established. The reliefs prayed for are found unjustified. The Court has found the petition was filed as an afterthought upon petitioner’s failure to exhaust prescribed statutory procedure and the petition is liable to dismissal with costs.

In conclusion the petition is hereby dismissed with costs.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS  
FRIDAY 21<sup>ST</sup> FEBRUARY, 2025.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

