



Muchina v Board of Directors, Kirinyaga County Water and Sanitation Company PCL (KICOWASCO) & 2 others (Constitutional Petition E007 of 2024) [2025] KEELRC 935 (KLR) (26 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 935 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

CONSTITUTIONAL PETITION E007 OF 2024

ON MAKAU, J

MARCH 26, 2025

**IN THE MATTER OF: ARTICLE 3(1), 22, 23, 48, 50(1), 162(2) (A), 165(5),
258 & 259 (1) OF THE CONSTITUTION**

AND

**IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 1, 2, 3, 4(2),
10, 19, 20, 21, 22, 24, 27, 41, 47, 73, 75, 129, 153(4)
(A), 232, & 259(1) OF THE CONSTITUTION**

AND

**IN THE MATTER OF: THE ALLEGED VIOLATION OF SECTION 37 OF THE
PUBLIC SERVICE COMMISSION ACT**

BETWEEN

ERIC MURIITHI MUCHINA PETITIONER

AND

**BOARD OF DIRECTORS, KIRINYAGA COUNTY WATER AND SANITATION
COMPANY PCL (KICOWASCO) 1ST RESPONDENT**

MANAGING DIRECTOR, KICOWASCO 2ND RESPONDENT

**CHIEF OFFICER ENVIRONMENT, WATER & NATURAL RESOURCES,
KIRINYAGA COUNTY 3RD RESPONDENT**



JUDGMENT

Introduction

1. The Petitioner, a Member of County Assembly (MCA) in Kirinyaga County Assembly, filed the Petition herein dated 19th April 2024 challenging the recruitment of 22 employees by the respondents alleging violation of the Constitution, statutes, Mwangozo Guidelines for parastatals, among others. Therefore, it sought the following reliefs:
 - a. A declaration that the job advertisement and any recruitment vide the said advertisement for staff indicated thereof is null and void.
 - b. A declaration that the purported declaration of vacancy and the advertisement for the recruitment to the positions vide the undated job advertisement and any recruitment is null and void.
 - c. An order of certiorari quashing the purported declaration superintendent zonal plumbers/ meter readers, drivers and general labourers by KICOWASCO as advertised in the undated advertisement.
 - d. A permanent injunction restraining the Respondents whether acting directly or through third parties, agents and/or proxies from illegally or irregularly advertising, interviewing, recruiting, employing, confirming and/or otherwise filing up the position.
 - e. A finding and holding that the 1st and 2nd Respondents have engaged in malicious scheme of orchestrating the unlawful and unfair recruitment of staff while the finances of the KICOWASCO has extremely gone down to warrant the recruitment of new staff.
 - f. The costs of and incidental to this petition.
 - g. Interest on (k) above at court rates from the date of filing this petition to the date of full and final statement: and
 - h. Such other further incidental or alternative reliefs as the Honourable Court may deem just and expedient.
2. The petition was supported by Affidavits sworn on 19th April 2024 and 17th September 2024 and it was opposed by the respondents vide a Notice of Preliminary Objection dated 17th May 2024 and a replying Affidavit sworn by Peter Murumi, Chief officer Water & Irrigation on 28th May 2024.

Facts of the case

3. By a notice published in the Daily Nation newspaper of 15th March, 2024, Kirinyaga County Water and Sanitation Company PCL (KICOWASCO) advertised 22 vacancies in the positions Driver, Zonal Plumbers, Meter Readers, Finance & Resource Mobilization Manager, and Production Superintendent. The petitioner protested against the intended recruitment citing budgetary constraints, pending suppliers' bills and unremitted pension. The protest was communicated vide the letter dated 9th April to the County Executive Committee Member in charge of Environment, Water & Natural Resources and copied to 2nd and 3rd respondents herein.
4. The protest did not elicit any response and the recruitment process was carried out. The successful candidates were appointed vide letters dated 3rd May 2024 and they have since been working in their



- respective positions. The petitioner averred that the recruitment process violated Article 10 and 174 of the Constitution since no shortlisting was done and the public had not been invited to participate by giving their views over the recruitment.
5. He further averred that the advertisement of the vacancies by the company violated the guidelines issued by the Water Service Regulatory Board (WASREB) as per the Water Service Sector 2018 Manual. The advertisement also went against the warning given by the Auditor General and WASREB about the pending suppliers bills which exceeded Kshs.50,000,000 and unremitted pension exceeding Kshs.9,000,000.
 6. He further averred that the recruitment was advertised without evidence of budgetary appropriation as required by the Public Finance Management Act. Besides, the advertisement was done barely three days after the cost analysis report and without evidence of approval of the recruitment by the full Board. Further, the recruitment was done by an ad hoc committee and the appointments done hastily without involving the Board.
 7. He contended that the company had a history of illegal recruitment of staff which are done without due process of law and therefore it ought to be tamed. He further stated that the petition should be allowed in order to ensure statutory and constitutional compliance plus accountability on public funds and governance.
 8. On the other hand, the respondents averred that the petition is defective as it does not meet the competence threshold enunciated in Anarita Karimi vs Republic (No. 1) 1 KLR 154.
 9. The Respondents further averred that the 1st respondent in its ordinary meeting gave approval for recruitment of eight (8) casual/general labourers, twelve (12) zonal plumbers/meter readers, one driver, one production superintendent and one finance & resource mobilization manager. Subsequently, 22 vacancies in the said positions were advertised in the Daily Nation newspaper on 15th March 2024, so as to reach a wide population of potential applicant, as contemplated under Article 10, 35 and 46 of the Constitution read with section 96 of the County Government Act.
 10. They averred that the recruitment process, including shortlisting and interviews was done and successful candidates were duly appointed vide letters dated 3rd May 2024. Before the appointments, a cost analysis summary was done showing the monthly implication for salaries and other remuneration benefits being Kshs.564,100 cumulatively. Therefore, the respondents maintained that the recruitment process was done in accordance with the statutes and the Constitution.
 11. The respondents further averred that the recruitment was necessary to avert negative ramifications of staff shortage such as loss of revenue due to unaccountability and increase in non-revenue water volumes due to pipe leakage. They contended that the recruited staff are crucial for purposes of enhancing the efficiency of KICOWASCO's operations and ensuring progressive achievement of public's right to clean and safe water in adequate quantities.
 12. Finally, the respondent's averred that the suit is overtaken by events and therefore it should be dismissed with costs.

Submissions

13. The Petitioner in his submissions reiterated the contents of his Petition that the recruitment was not sanctioned by a resolution of the full Board; that it violated guidelines from WASREB; that the company should have first paid pending suppliers bills totalling to Kshs.50,000,000 and unremitted pension contribution amounting to Kshs.9,000,000; that no evidence of budgetary appropriation was tabled to support the recruitment contrary to the Public Finance Management Act; that the company



failed to involve the public in the advertisement; and that the company ought to be tamed as it has a history of recruiting staff without following due process of the law.

14. To fortify the above submission, the Court was urged to seek guidance from Nairobi ELRC Petition No. E156 of 2021 Okiya Omtatah Okoit v The Board of Directors, northern Waterworks Development Agency [2021] eKLR and Nairobi Petition No. E242 of 2022 Omwanza Obati v Chief Justice & President of the Supreme Court & others [2022] 11630 (KLR).
15. On the other hand, the Respondents submitted on, whether the recruitment process by the 1st Respondent was procedural, and whether the orders sought by the Petitioner are merited. On the first issue, it was argued that the Petitioner has not produced any evidence before the Court to prove that the Respondents acted in an illegal, irrational or unprocedural manner so as to warrant this Court's intervention.
16. It was, however, submitted that the Respondents has presented evidence showing that the recruitment process was conducted in compliance with the *Constitution*, the County Government Act and the principles of transparency, accountability and public participation.
17. It was pointed out that the vacancies were advertised in the Daily Nation on 15th March 2024 in line with the principles of access to information and transparency after the Board of Directors approved the recruitment of the 22 new staff members on 19th January 2024. It further pointed out that the process was undertaken after thorough analysis and approval including cost implications.
18. To emphasize on the above the point, reliance was placed on the case of Havi & 2 others v Kenya Medical Supplies Authority & 4 others, Ramadhani (Interested Party) [2023] KEELRC 2010 (KLR)
19. On the second issue, reliance was placed on section 7(2) of the Fair Administrative Actions Act which provides that judicial review remedies can only be issued on grounds of illegality, irrationality, and procedural impropriety. It was further submitted that the petition offends section 9 of the Fair Administrative Actions (FAA) Act, which provides the procedure for seeking Judicial review remedies to be by way of Judicial Review application to impugn the offending administrative action and not to file a petition. Consequently, it was submitted that the remedy of certiorari sought in the instant petition cannot issue to the petitioner.
20. To fortify the said position, reliance was placed on the case of Athuuri Agikuyu Uasin Gishu County v Uasin Gishu County Government [2019] KEELRC 3042 (KLR) where Odeny J dismissed a petition challenging administrative action and held that an aggrieved person ought to move the court by way of judicial review application and not petition.
21. As regards the merit of the petition, it was reiterated that the Petitioner has not produced any evidence before the Court to prove that the Respondents acted in an illegal, irrational or unprocedural manner so as to warrant this Court's intervention. On the contrary, it was submitted that the respondents have tendered evidence to prove that the recruitment process was undertaken after thorough analysis, including cost implication on the company, with the aim of ensuring that KICOWASCO could deliver on its mandate.
22. It was submitted further that the petition has not met the thresholds for granting injunction espoused in the case of Giella vs Cassman Brown (1973) EA 358. It was argued that the petitioner is challenging a lawful process that was executed in a transparent manner and within the bounds of the law. Finally, the court was urged to find that the petition lacks both legal and factual foundation and dismiss it with costs.



Issues for determination and analysis

23. I have carefully considered the petition, affidavits and the written submissions filed. There is no dispute that the 1st and 2nd respondents advertised the impugned 22 vacancies and filled them by appointment letters dated 3rd May 2024. The issues falling for determination are:
- a. Whether the Petition meets the competency threshold for constitutional petitions.
 - b. Whether the petition herein is overtaken by events.
 - c. Whether the respondents violated the Constitution by undertaking the impugned recruitment.
 - d. Whether the Petitioner is deserving of the reliefs sought.

Competence threshold

24. The competence threshold in constitutional petitions was enunciated in the case of Anarita Karimi Njeru v Republic [1979- 1980] KLR 1272 where the High Court held that:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

25. In John Mining Temoi & another v Governor of Bungoma County & 17 others [2014] eKLR the court it stated as follows:

“81. As a basic minimum, the Petitioners are required to not only cite the provisions of the Constitution which have been violated but also the manner in which they have been violated with regard to them. See the case of Anarita Karimi Njeru (1976-80) 1 KLR 1272 and Trusted Society of Human Rights Alliance -v- Attorney General & Others High Court Petition No. 229 of 2012. In demonstrating the manner in which there has been a violation of their rights or of the Constitution, the Petitioners should present before the court evidence or a factual basis on which the court can make a determination whether or not there has been a violation...”

26. In this case, the Petition merely alleges that the respondents have violated Article 10 and 174 of the Constitution, but it does not plead the particulars of the alleged violation (injury) and how the violation was done. All that is pleaded is that the recruitment was not advertised which is not true. In the case of Timothy Njoya v Attorney General & another [2014] eKLR where Lenola J (as he then was) stated that:

“I must state at the outset that this Court deals with real and not hypothetical or perceived disputes. It is therefore a court of law mandated to deal with real disputes and a party must approach the court with hard facts which would reveal a violation of the Constitution and



as a result, get a relief for that violation. That is why the Court in John Harun Mwau and Others v Attorney General and Others. Petition No. 65 of 2011 warned that;

“...this court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the Constitution under Article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy”.

I agree with the above reasoning, and with respect, the petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the Court. He must also plead his case with some degree of precision and set out the manner in which the Constitution has been violated, by whom and even state the article of the Constitution that has been violated and the manner in which it has been violated”

27. Having carefully perused the petition, and with the guidance of the authorities cited above, I find and hold that the Petition herein does not meet the competence threshold for constitutional petitions.

Whether the petition is overtaken by events

28. The petitioner did not rebut the evidence by the respondents that the impugned recruitment was completed way back in May 2024 when the successful candidates were appointed and they have since been in service. In fact, the petitioner acknowledged in paragraph 3(g) and (h) of his Supplementary Affidavit sworn on 17th September 2024 that the respondents issued appointment letters to the new staff two days after receiving the report of the recruitment committee dated 30th April 2024. Consequently, I find that the petition is overtaken by events and it has become a moot case with respect to the prayer for injunction.

Violation of the Constitution

29. I have already held that the petition does not meet the competence threshold. However, suffice to say that my careful consideration of the evidence presented by the respondents, I am satisfied that the values and principles of public service under Article 232 of the Constitution were not violated as the recruitment was done competitively and in an open manner. The recruitment was also sanctioned by the board and analysis of financial impact conducted before the appointments were done.

Reliefs

30. In view of the findings made above, I am satisfied that the petition is incompetent and devoid of merits and it is hereby dismissed. Since the suit is a public litigation in nature, each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 26TH DAY OF MARCH, 2025.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

