



Simiyu v Principal Secretary, State Department for Internal Security and National Administration & 6 others; Okumu & 2 others (Interested Parties) (Constitutional Petition E004 of 2024) [2025] KEELRC 719 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 719 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CONSTITUTIONAL PETITION E004 OF 2024**

DN NDERITU, J

MARCH 6, 2025

**IN THE MATTER OF ARTICLE: ARTICLES 3(1), 10, 22, 23, 35, 27, 41, 47,
159, 162, 232, 234, 258 AND 259 OF THE CONSTITUTION OF KENYA.**

**IN THE MATTER OF: SECTION 5(1), 5(3), 5(7), AND 5(8)
OF THE EMPLOYMENT ACT CAP 226 NO. 11 OF 2007**

**IN THE MATTER OF: THE ALLEGED VIOLATION OF FUNDAMENTAL RIGHTS
AND FREEDOMS AS ENshrINED IN THE CONSTITUTION OF KENYA, 2010.**

**IN THE MATTER OF: SECTIONS 7 AND 9(6) OF THE ACCESS TO INFORMATION ACT,
2016 AND THE ALLEGED CONTRAVENTION OF SECTIONS 3, 4, 5, 6 AND 9(1) THEREOF**

**IN THE MATTER OF: SECTIONS 7 OF THE FAIR ADMINISTRATIVE ACTION ACT,
2015 AND THE ALLEGED CONTRAVENTION OF SECTIONS 3, 4, 5, AND 6 THEREOF**

**IN THE MATTER OF: BREACH OF THE RIGHTS OF AN EMPLOYEE, GOOD
GOVERNANCE, RULE OF LAW, AND LEGITIMATE EXPECTATIONS.**

BETWEEN

DANIEL SAYA SIMIYU PETITIONER

AND

**THE PRINCIPAL SECRETARY, STATE DEPARTMENT FOR INTERNAL
SECURITY AND NATIONAL ADMINISTRATION 1ST RESPONDENT**

**DEPUTY COUNTY COMMISSIONER, WEBUYE WEST SUB
COUNTY 2ND RESPONDENT**

COUNTY COMMISSIONER, BUNGOMA COUNTY 3RD RESPONDENT

REGIONAL COMMISSIONER, WESTERN REGION 4TH RESPONDENT

THE SECRETARY, PUBLIC SERVICE COMMISSION 5TH RESPONDENT



DAVID NGATA WEKESA 6TH RESPONDENT

HOSEA WAMALWA WEKESA 7TH RESPONDENT

AND

PHILIP KIBERENGE OKUMU INTERESTED PARTY

SICHANGI FRANKLIN WANJALA INTERESTED PARTY

THE ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

JUDGMENT

I. Introduction

1. The petitioner commenced these proceedings by way of a petition dated 19th September, 2024 through Wekesa E. Wanjala Advocate seeking for the following reliefs –
 - a. A declaration that the 1st – 5th respondents’ action of appointing, coronating the 6th and 7th respondents and assuming office as Assistant Chiefs amounts to discrimination, unjustifiably selective and unequal treatment against the 1st and 2nd interested parties and is contrary to Articles 10, 27, 41 and 47 of *the constitution*.
 - b. A declaration that the 1st – 5th respondents’ action of appointing, coronating the 6th and 7th respondents and assuming office as Assistant Chiefs is irregular, unlawful, and unconstitutional violating Articles 10, 27, 41 and 47 of *the constitution* and therefore, invalid, null and void.
 - c. A declaration that the petitioner’s and 1st and 2nd interested parties’ legitimate expectation has been infringed.
 - d. An order of permanent injunction restraining the 6th and 7th respondents from carrying on with duties as assistant chiefs in Miendo and Matisi Sub Locations respectively.
 - e. An order of certiorari to bring to this Honourable court and quash the letters appointing the 6th and 7th respondents as assistant chiefs of Miendo and Matisi Sub Locations respectively.
 - f. And Order of Mandamus compelling the 1st – 5th respondents to issue appointment letters to the 1st and 2nd interested parties, coronate and induct them into office as assistant chiefs of Miendo and Matisi Sub Locations respectively.
 - g. An order for costs of the petition.
 - h. Such other orders as the court may deem fit to grant.
2. Contemporaneously, the petitioner filed a notice of motion (the application) seeking the following interim orders –
 1. This matter be certified urgent and the same be heard on priority basis, service be dispensed with in the first instance.



2. The 6th and 7th respondents herein be temporarily restrained from assuming office and commencing duties of assistant chiefs in Miendo and Matisi Sub Locations respectively pending the hearing and determination of this application.
3. The 6th and 7th respondents be temporarily restrained from assuming office and commencing duties of assistant chiefs in Miendo and Matisi Sub Locations pending the hearing and determination of this petition.
4. Costs be provided for.
3. The application was allowed as prayed and interim orders issued accordingly pending the hearing and determination of the petition.
4. Though duly served, the respondents, except for the 5th respondent, did not file any responses to the petition. The 5th respondent filed a replying affidavit in support of the petition.
5. The court directed that the petition be canvassed by way of written submissions. The counsel for the petitioner filed written submissions on 23rd January, 2025 but the other parties did not file any submissions.

II. The Petitioner's Case & Evidence

6. In summary, the petitioner described himself as a public spirited individual, a human rights defender with special interest in access to justice, democracy, public accountability, transparency, leadership, and governance. The respondents and the interested parties are described as per their obviously instructive naming and or their institutional, legal, or administrative mandates.
7. It is pleaded that sometimes in 2023 there arose vacancies in the office of assistant chiefs for Miendo and Matisi Sub-Locations within Webuye West Sub-County of Bungoma County, and qualified persons were invited to apply. Amongst those who applied were the 1st and 2nd interested parties who were shortlisted and interviewed attaining the first position in their respective sub-locations. The two were thus recommended for appointment by the interviewing panel.
8. However, in unwarranted and illegal turn of events the 6th and 7th respondents were issued with letters of appointment. The two respondents had not been recommended by the interviewing panel, the County Commissioner, or the Regional Commissioner. Inquiries by the petitioner on how the foregoing unfolded were ignored and or neglected by the 5th respondent.
9. It is pleaded that having applied for the said vacancies, interviewed, and attained the first positions in their respective sub-locations, the interested parties held legitimate expectation in appointment to the said positions. It is pleaded that the issuance of appointment letters to the 6th and 7th respondents was un-procedural, irregular, unlawful, illegal, and unconstitutional.
10. The petitioner reiterated the forgoing in his supporting affidavit to the petition and annexed copies of the interviewing panel's reports for the two Sub-Locations and the letters of appointment dished out to the 6th and 7th respondents.
11. It is stated, both in the body of the petition and the supporting affidavit, that the respondents violated the cited provisions of the law and *the Constitution*.

III. The Respondents' Case & Evidence**

12. As noted above, though served, the respondents, except for the 5th, did not respond to the petition.



13. In its replying affidavit by Paul Famba, the secretary/CEO, the 5th respondent (the Commission) stated that through a cited instrument of delegation the Commission authorized the 1st respondent to exercise some delegated mandate in appointing chiefs and assistant chiefs but only in a limited extent and in full and constant consultation with the Commission. A copy of the said instrument is attached to the affidavit.
14. It is deposed that the 1st respondent violated and failed to comply with the delegated mandate resulting in the irregular, un-procedural, illegal, and unlawful appointment of the 6th and 7th respondents as such.
15. The 5th respondent is thus in support of the petition.

IV. Submissions

16. The petitioner's counsel filed written submissions on 18th December, 2024 but the respondents did not file any submissions. However, counsel for the 5th respondent indicated that it relied on the filed replying affidavit in support of the petition.
17. It is submitted for the petitioner that the petition is unopposed. Counsel for the petitioner identified the following issues for determination –
 - i. Whether the 6th and 7th respondents merited for appointment to the position of Assistant Chief II, Miendo and Matisi Sub-locations respectively;
 - ii. Whether the appointment of the 6th and 7th respondents to the position of Assistant Chief II, Miendo and Matisi Sub-locations was unconstitutional.
 - iii. Whether the respondents infringed the constitution or any of the constitutional rights of the petitioner, and the rights of the 1st and 2nd interested parties; and
 - iv. Whether the petitioner is entitled to the prayers sought.
18. On the first issue, it is submitted that there is no basis, legal, factual, legal, or constitutional, upon which the 6th and 7th respondents were appointed to the impugned positions as alluded to in the summary of the pleadings above. It is submitted that the said two respondents did not merit the appointments as no such merits were demonstrated as required under Section 36 of the Public Service Commission Act.
19. It is further submitted that recruitment and appointments into public positions must be based on the principles of public service as spelt out under Article 232(1) of the Constitution and Section 36(1) of the Public Service Commission Act alongside Section 10(1) of the Public Service (Values and Principles) Act. It is submitted that the impugned positions that the 6th and 7th respondents were unlawfully and unconstitutionally appointed to are public offices as defined under Article 260 of the Constitution and Section 2 of the Public Service Commission Act alongside Section 2 of the Public Service (Values and Principles) Act.
20. It is further submitted that it is in recognition of the foregoing legal reality that Section 15(1) & (2) of the National Government Coordination Act provides that in appointment of administrative officers, including chiefs and sub-chiefs, the cabinet secretary in the relevant ministry shall liaise with the Commission.
21. It is submitted that the appointment of the 6th and 7th respondents into the impugned public offices was neither based on merits nor on any other constitutional or legal considerations and as such the said appointments were in blatant breach of the law and the constitutional provisions cited in the foregoing



paragraphs and further cited in the petition. The court is urged to note and adopt the reasoning and conclusions made in *Community Advocacy & Awareness Trust & Others v Attorney General Nairobi HC Petition No. 243 of 2011*.

22. It is further submitted that while the 1st and 2nd interested parties were ranked top for the two impugned positions, the respondents, without consulting or seeking the input of the Commission, appointed the 6th and 7th respondents without any factual, legal, or constitutional basis and in blatant and unmitigated violation of the legal and constitutional provisions cited in the petition and reiterated in the foregoing paragraphs of this judgment.
23. On the second issue, which is a closely related to the first issue discussed above, it is submitted that the letters of appointment issued to the 6th and 7th respondents were lawfully and rightfully supposed to be issued to the 1st and 2nd interested parties on merit. It is thus submitted that the said letters as issued to the 6th and 7th respondents were unlawful and unconstitutional and hence null and void.
24. It is further submitted that the impugned appointments violated all known principles of public appointments and service that are expected to be based on merit and the principles enunciated in the foregoing paragraphs. It is submitted that the impugned appointments of the 6th and 7th respondents were based on evident patronage, nepotism, favourism, dishonesty, partiality, bias, and other related evils, as opposed to meritocracy, the very antithesis of the letter and spirit of the above cited statutory and constitutional provisions.
25. It is submitted that while Section 31 of the *Public Service Commission Act* gives the Commission the discretion to delegate its powers of appointment into public offices to its members, officers, body, or authority, such delegation does not divest the Commission of the powers to ensure that any appointments so made are in accordance with the provisions of the law cited above. It is on that basis that the 5th respondent rightfully and responsibly supported the petition against the clearly and evidently unlawful and unconstitutional appointments of the 6th and 7th respondents into the impugned positions.
26. It is submitted that contrary to the delegation instrument issued by the Commission to the Ministry of Interior and Coordination of National Government, the 1st respondent, through the 2nd, 3rd, and 4th respondents, failed, refused, and or neglected to report the shortlisting of the candidates for scrutiny and approval by the Commission before the impugned appointments. It is submitted that this was done in violation of the instrument of delegation. Further, it is submitted that based on the replying affidavit for the Commission the 1st to 4th respondents did not inform the Commission of the outcome of the process and the impugned appointment of the 6th and 7th respondents.
27. In any event, it is submitted, the 1st respondent had no powers or authority to issue letters of appointment as it was done without the approval and scrutiny of the Commission, the 5th respondent. The court is urged to adopt the reasoning and holding in *Okiya Omtatah Okoiti v Cabinet Secretary, Ministry of Education, Science and Technology & Another [2019]*.
28. On the third issue, it is submitted that based on the foregoing, the impugned appointments were clearly and obviously unlawful, unconstitutional, null, and void. It is emphasized that by conducting themselves in the manner described in the foregoing paragraphs the 1st to 4th respondents violated the cited constitutional rights of the petitioner and those of the 1st and 2nd respondents.
29. It is submitted that the petitioner filed this petition in the public interest based on Articles 258(2) (c) and 22 of *the Constitution* and also as a resident Webuye Sub-County wherein the affected sub-locations are situate. It is submitted that his request for details of the recruitment process from the



5th respondent was not responded to and hence his right to information was violated based on the provisions of Article 35 of *the Constitution* and Sections 4 & 5 of the *Access to Information Act*.

30. It is further submitted that the constitutional rights of the 1st and 2nd respondents to fair labour practices under Article 41 of *the Constitution* were violated. Further, it is submitted contrary to Article 27 of *the Constitution* and Section 5 of the *Employment Act* the said interested parties' rights were violated.
31. In view of the violations cited above, counsel for the petitioner urges the court to remedy the petitioner under Article 23 of *the Constitution* and the court is urged to grant the petitioner as pleaded in the petition.

V. Issues For Determination

32. The court has carefully and dutifully gone through the petition and the supporting affidavit and the annexures thereto by the petitioner, and the replying affidavit by the 5th respondent and the annexures thereto. The contents of the said records have been summarized in a part dedicated to the same herein above. The court has also summarized the submissions by the petitioner's counsel in the foregoing paragraphs of this judgment.
33. The following issues commend themselves to the court for determination –
 - a. Was the appointment of the 6th and 7 respondents into the office of assistant chief/sub-chief for their respective sub-locations proper, lawful, and constitutional?
 - b. Is the petitioner entitled to the reliefs/remedies sought?
 - c. What are the appropriate orders for the court to make?
 - d. Costs.

VI. The Appointments

34. The facts as stated by the petitioner have not been disputed. In a nutshell, the Ministry of the Interior and Coordination of National Government through delegated powers from the 5th respondent is authorized to declare, advertise, and take lead in recruitment for various administrative positions and units including those in the office of assistant chief.
35. Sometimes in 2023 the Ministry advertised vacancies in the office of sub-chiefs for Miendo and Matisi sub-locations in the Webuye Sub-County of the greater Bungoma County inviting suitably qualified persons to apply. Among the many applicants were the two interested parties who emerged the first ranked in the respective positions stated above and were thus recommended by the interviewing panel for appointment into the said positions. The ranking and the recommendation reports by the panel are attached to the petition.
36. However, in an ugly, unlawful, and unconstitutional move, letters of appointment, without any justification whatsoever, were issued to the 6th and 7th respondents. Evidently, the said appointments were in clear violation of the constitutional and statutory provisions so well and elaborately captured by the petitioner's counsel in his very apt and eloquent submissions summarized in an earlier part of this judgment. In fact, the court fully concurs with the arguments and the reasoning advanced in those submissions.



37. Further, the respondents and the interested parties, though served, opted to keep away from these proceedings. The 5th respondent participated in the proceedings in full support of the petition and the petitioner's cause.
38. It is therefore evidently clear that the appointment of the 6th and 7th respondents to the office of sub-chief of the respective impugned sub-locations were unlawful, unconstitutional, null, and void. The appointments fail the test of the applicable constitutional and statutory tests so well elaborated by counsel for the petitioner as summarized elsewhere above and there is no way of justifying or resuscitating the same. The said appointments were done in blatant and unmitigated violation and abuse of the constitutional principles on leadership and integrity and the applicable statutes so well laid out by counsel for the petitioner.

VII. Reliefs

39. Prayer (a) is for a declaration that the 1st to 5th respondents in appointing the 6th and 7th respondents to the impugned positions discriminated and applied unequal treatment to the 1st and 2nd interested parties contrary to Articles 10, 27, 41, & 47 of *the Constitution*. The court agrees with the petitioner that the said constitutional rights were violated by the said selective and discriminative appointments that violated the above provisions of *the Constitution* and defied all logic. The declaration sought is hereby granted.
40. However, it must be noted that the 5th respondent disassociated itself from the said appointments and came out strongly in support of the petition. It is clearly evident that contrary to the express delegated powers donated to the Ministry, the other respondents acted ultra vires in violation of the constitutional provisions cited above. In that behalf, the 5th respondent is not condemned in the declaratory orders made herein.
41. Prayer (b) is for a declaratory order that the 1st to 5th respondents in appointing and allowing the 6th and 7th respondents to assume office acted in an irregular, unlawful, and unconstitutional manner in violation of the Articles of *the Constitution* cited above. The said actions by the 1st to 4th respondents are hereby declared invalid, null, and void.
42. For prayer (c) the court declares that the legitimate expectation on the part of the 1st and 2nd interested parties was infringed and violated.
43. For prayer (d), the court has already found that the appointment of the 6th and 7th respondents to the impugned positions was unlawful, unconstitutional, null, and void ab initio. Mutatis mutandis, the court hereby issues a permanent injunction restraining them from carrying on duties as assistant chiefs for Miendo and Matisi sub-locations respectively.
44. In regard to prayer (e), the letters of appointment issued to the 6th and 7th respondents as cited above are hereby quashed and declared mere nullities.
45. For prayer (f), the court notes that the 1st and 2nd interested parties were ranked first for their respective positions following a fair, lawful, accountable, and transparent process that was only tainted at the end by the 1st to 4th respondents allowing unlawful issuance of letters of appointment to the 6th and 7th respondents. It would make no sense for the exercise to be repeated with the clear and unambiguous evidence that the 1st and 2nd interested parties emerged the lawfully most suitable and qualified candidates for the respective positions. It shall be unfair to order that the exercise be repeated at the expense of the taxpayer and at great prejudice to the two interested parties. In any event, the appointing authority, the 5th respondent, is in full support of the petition.



46. For the foregoing reasons the court orders and directs that letters of appointment be issued to the 1st and 2nd interested parties to the position of assistant-chief for Miendo and Matisi sub-locations, respectively, within 30 days of this judgment.

47. This being a public interest litigation the court declines to make an order on costs.

VIII. ORDERS

48. The court makes the following orders –

- a. A declaratory order be and is hereby issued that the actions by the 1st to 4th respondents in appointing and coronating the 6th and 7th respondents as assistant/sub-chiefs for Miendo and Matisi sub-locations of Webuye Sub-County of Bungoma County were discriminative, selective, unfair, unlawful, and violated Articles 10, 27, 41, & 47 of *the Constitution*.
- b. That the above appointments were therefore invalid, unlawful, unconstitutional, null, and void ab initio.
- c. That the said unlawful and unconstitutional appointments violated the legitimate expectation of the 1st and 2nd interested parties.
- d. That an order of a permanent injunction be and is hereby issued restraining the 6th and 7th respondents from carrying on duties of assistant chiefs in the said sub-locations respectively.
- e. That the letters of appointment issued to the 6th and 7th respondents into their respective positions be and are hereby called into this court and quashed and declared nullities.
- f. That in the interest of justice and to spare the taxpayer further unnecessary costs, the respondents, and in that behalf the 5th respondent, is hereby ordered and directed to within 30 days of this judgment issue appointment letters to the 1st and 2nd interested parties to occupy their respective positions for which they were ranked first.
- g. There is no order as to costs.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT BUNGOMA THIS 6TH DAY OF MARCH, 2025.

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DAVID NDERITU
JUDGE
JUDGMENT

