



**Omao & another v Arati (Governor County Government of Kisii)  
& 5 others; Nyandieka (Interested Party) (Petition E014 of 2023)  
[2024] KEELRC 11 (KLR) (24 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 11 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E014 OF 2023**

**S RADIDO, J**

**JANUARY 24, 2024**

**IN THE MATTER OF THE ENFORCEMENT OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23,  
162(2)(A), 258 AND 259(1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS  
AND FREEDOMS IN ARTICLES 25, 27, 28, 33, 35,  
41 47, 48, AND 50 OF THE CONSTITUTION OF  
KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF  
SECTION 13 OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012**

**AND**

**IN THE MATTER OF THE OFFICE OF THE COUNTY ATTORNEY ACT NO. 14 OF 2020  
AND PUBLIC APPOINTMENTS (COUNTY ASSEMBLIES APPROVAL) ACT NO. 5 OF 2017**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION AND  
INFRINGEMENT OF THE FAIR ADMINISTRATION ACT, 2015  
AND IN THE MATTER OF THE EMPLOYMENT ACT NO. 11 OF 2007**

**BETWEEN**

**VINCENT MARIITA OMAO ..... 1<sup>ST</sup> PETITIONER**

**DAVID MANGONDI SENEMA ..... 2<sup>ND</sup> PETITIONER**

**AND**



HON PAUL SIMBA ARATI (GOVERNOR COUNTY GOVERNMENT OF KISII) ..... 1<sup>ST</sup> RESPONDENT  
COUNTY GOVERNMENT OF KISII ..... 2<sup>ND</sup> RESPONDENT  
COUNTY SECRETARY, KISII KISII COUNTY PUBLIC SERVICE BOARD ..... 3<sup>RD</sup> RESPONDENT  
CLERK, KISII COUNTY ASSEMBLY ..... 4<sup>TH</sup> RESPONDENT  
SPEAKER, KISII COUNTY ASSEMBLY ..... 5<sup>TH</sup> RESPONDENT  
KISII COUNTY ASSEMBLY ..... 6<sup>TH</sup> RESPONDENT

AND

ALFRED ONGIRI NYANDIEKA ..... INTERESTED PARTY

### JUDGMENT

1. Hon Paul Simba Arati (the Governor) gazetted the appointment of Alfred Ongiri Nyandieka (Interested Party) as the County Attorney, Kisii through Gazette Notice No. 14717 on 30 November 2022. A letter of appointment was issued on 1 December 2022.
2. On 18 May 2023, the Petitioners filed a Petition alleging that the appointment of the Interested Party did not meet the threshold envisaged by Articles 10, 159(2)(e), 232(1)(g) & (2)(a) of *the Constitution*, section 17(2)(i) of the *Public Service (Values and Principles) Act*, section 37 of the *Public Service Commission Act*, sections 4, 5 and 6(2),(3) and (4) of the *Public Appointments (County Assemblies Approval) Act*, the *County Governments Act* and the Office of the County Attorney Act.
3. The Petitioners filed an Amended Petition on 24 May 2023, in which they sought the following reliefs:
  - (i) A declaration that the 1<sup>st</sup> 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 1<sup>st</sup> Respondent's decision purporting to summarily appoint the Interested Party as County Attorney of the Kisii County Government.
  - (iii) A declaration that the 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> Respondent in this cause violated the Constitutional provisions under Articles 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 1<sup>st</sup> Respondent.
- (viii) Such other orders as this Honourable Court shall deem fit and just to grant in the circumstances.
4. The County Secretary and Head of the Public Service filed a replying affidavit in opposition to the Motion which had accompanied the initial Petition and the Petition on 25 May 2023.
5. The Clerk, Speaker, and County Assembly of Kisii caused a replying affidavit sworn by the acting Clerk in opposition to the Amended Petition to be filed on 7 June 2023.
6. The County Public Service Board through one Judy Omare Nyakerario filed a replying affidavit on 9 June 2023, and another affidavit on 12 June 2023.
7. Because of a dispute concerning the representation of some of the Respondents, the Court delivered a Ruling on 4 October 2023 on the question of the representations, after which the Court gave directions on the filing and exchange of responses and submissions.
8. The directions were:
- (i) The Respondents who had not responded to the Amended Petition to file and serve responses on or before 19 October 2023.
- (ii) The Petitioners to file and serve any further affidavit together with submissions on or before 3 November 2023.
- (iii) The Respondents and Interested Party to file and serve submissions on or before 24 November 2023.
- (iv) Judgment on 29 November 2023.
9. When the Petition was called for judgment on the scheduled date, it emerged that the parties had not complied with the directions.
10. The 1<sup>st</sup> to 4<sup>th</sup> Respondents and Interested Party had filed their replying affidavits only on 28 November 2023. They also filed joint submissions on the same day.
11. The 5<sup>th</sup> to 7<sup>th</sup> Respondents had on their part filed their submissions on 24 November 2023.
12. The Petitioners' advocate was not in Court, and the 1<sup>st</sup> Petitioner requested the Court to give him 7 days to reach out to his advocate.
13. The Court rescheduled the judgment to today and indicated that it would address the question of filing of submissions in the body of the judgment.
14. The Petitioners filed their submissions on 8 January 2024 (should have been filed and served on or before 3 November 2023).

### **The Petitioners' case**

15. The Petitioners in challenging the appointment of the Interested Party contended that the Governor unlawfully gazetted and issued an appointment letter to the Interested Party as the County Attorney on or around 30 November 2022.
16. In asserting that the appointment was unlawful, the Petitioners contended that the appointment was not preceded by a public advertisement as envisaged by Articles 159(2)(e), 232(1)(g), and (2)(a) of *the*



Constitution and section 17(2)(e) of the Public Service (Values and Principles) Act, 2015, section 37 of the Public Service Commission Act, 2017 and sections 4, 5, 6(2),(3) and (4) of the Public Appointments (County Assemblies Approval) Act.

17. The Petitioners also assailed the appointment of the Interested Party on the ground that the vetting contemplated by section 7 of the Public Appointments (County Assemblies Approval) Act was not conducted by the County Assembly.
18. Further, the Petitioners maintained that the appointment of the Interested Party was contrary to the requirements of the County Governments Act and the Office of the County Attorney Act, 2020.
19. The Petitioners averred that despite seeking information appertaining to the appointment of the Interested Party, the Respondent had declined to furnish them with the information.
20. In the joint submissions, the Petitioners urged only a single issue, that the County Assembly did not comply with the prescriptions of Standing Order No. 65 of the Kisii County Assembly Standing Orders because the Hansard did not capture how the approval voting was conducted during the plenary of the County Assembly.

#### **1<sup>st</sup> to 4<sup>th</sup> Respondents case**

21. The case for these Respondents was outlined in the replying affidavit sworn by the County Secretary.
22. In the affidavit, it was deponed that the Governor nominated the Interested Party on 15 November 2022 by virtue of the powers given to him by sections 5 and 6 of the Office of the County Attorney Act, 2020 and then sent the name to the Speaker for vetting and approval by the County Assembly (copies provided).
23. According to these Respondents, the Clerk caused to be published in the Daily Nation on 17 November 2022 a notice inviting comments from the public and that vetting was set for 25 November 2022.
24. The Clerk further deposed that the Interested Party appeared for the vetting, was vetted, and a report submitted to the County Assembly. The County Assembly adopted the report on 29 November 2022, wherein the Speaker informed the Governor of the approval, leading to the gazetteement and appointment.
25. These Respondents argued that there is no requirement for a competitive appointment of a County Attorney under the Office of the County Attorney Act, 2020.
26. The Respondents also challenged the locus standi of the Petitioners and their bona fides in suing without disclosing that they were related to some of the key legal actors in the Petition.
27. The 1<sup>st</sup> to 4<sup>th</sup> Respondents drew the attention of the Court to the case of Commission for Human Rights and Justice v Michelle Bibi Fondo and R v Public Procurement Administrative Review Board & 2 Ors (2019) eKLR to assert that the Governor had the discretion to nominate a qualified advocate to the position of County Attorney without going through the County Public Service Board and that failure to comply with a required procedure would not automatically render an appointment invalid.

#### **Assertions by 5<sup>th</sup> to 7<sup>th</sup> Respondents**

28. These Respondents took the position that the Petitioners had misapprehended its processes and work, and that the Interested Party had been nominated by the Governor and the nomination was taken through all the processes contemplated by the Standing Orders Nos 42 and 180 sections 5 and 6 of



the Office of the County Attorney Act and sections 7, 8 and 9 of the Public Appointments (County Assemblies Approval) Act.

### **Interested Party's take**

29. The Interested Party contended that the Petition was brought in bad faith since his appointment was in tandem with all the set procedures, qualifications and the law.

### **Evaluation**

#### **Failure to prosecute the Petition**

30. The parties suggested on 4 October 2023, and the Court agreed that the Petition be determined on the basis of the record and submissions to be filed and exchanged.
31. Consequently, the Court directed the parties starting with the Petitioners to file and serve their submissions on or before 3 November 2023. The Petitioners did not comply with the order.
32. 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.
33. The Court will nonetheless consider the merits of the Petition, on the assumption that it is wrong in the above conclusion.

### **Qualifications**

34. Section 5(2) of the Office of the County Attorney Act outlines the qualifications for one to qualify to hold the office of a County Attorney. There was no suggestion that the Interested Party did not meet the criteria therein.
35. The Court will therefore turn to the questions of whether there was public participation, consideration of merit, competitiveness and transparency in the appointment of the Interested Party.

### **Advertisement for the position of County Attorney**

36. It is not in dispute that the Governor did not publicly advertise the position of the County Attorney before settling on the Interested Party.
37. Section 5(1) of the Office of the County Attorney Act does not prescribe how the Governor should identify a qualified person for appointment as a County Attorney. It merely prescribes that the Governor will appoint the County Attorney with the approval of the County Assembly.
38. The statute that governs appointments where the approval of a County Assembly is required is primarily the *Public Appointments (County Assemblies Approval) Act*. The Act expressly sets out as much in section 4 wherein it provides: Exercise of powers of appointment

An appointment under *the Constitution* or any other law for which the approval of a County Assembly is required shall not be made unless the appointment is approved by the relevant County Assembly in accordance with this Act.

39. Section 5(1) of the Act presupposes an advertisement calling upon persons interested in being nominated, in the following terms:



#### Notification of vetting requirements

- (1) An advertisement inviting applications for nomination for appointment to an office to which this Act applies shall specify that the candidate shall be required to appear before a committee of the relevant County Assembly.
40. The requirement for an advertisement is buttressed by the provision of section 8(a) of the Act which contemplates a shortlisting of nominees as follows:

#### Issues for consideration

The issues for consideration by the relevant County Assembly in relation to any nomination shall be —

- (a) the procedure used to arrive at the nominee including the criteria for the shortlisting of the nominees;
41. 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.
42. 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](#).

#### Public participation

43. On 15 November 2022, the Governor notified the Speaker of the County Assembly that pursuant to the provisions of sections 5 and 6 of the Office of the County Attorney Act, he had nominated the Interested Party for the position of County Attorney. The Governor requested that the Interested Party be vetted.
44. The Speaker notified the County Assembly of the nomination on 16 November 2022, and at the same time he referred the nomination to the relevant Committee on Appointments as demanded by Standing Order No. 42(4) and section 9(1) of the Public Appointments (County Assemblies) Approval Act, 2017.
45. On 17 November 2022, the Clerk of the County Assembly caused to be published in the Daily Nation newspaper a notice to members of the public on the nomination of the Interested Party and calling upon him to appear for vetting on 25 November 2022. The venue of the vetting was disclosed.
46. The notice requested the public to submit any memorandum or petition on the vetting before 24 November 2022. Article 196 of [the Constitution](#) and section 7(4) and (5) of the Public Appointments (County Approval) Act were cited in the notice.
47. The Clerk swore an affidavit stating that no memorandum or petition was presented before the Committee. The assertion was not controverted.
48. The Interested Party appeared before the Committee and the Committee recommended his appointment in a report tabled before the County Assembly on 29 November 2022. The County Assembly approved the recommendation and the Speaker advised the Governor accordingly on the same day culminating in the appointment.
49. Public participation in the appointment process of public officers similarly situated to the Interested Party is supposed to be undertaken by and through the County Assembly.



50. The Court is satisfied that the County Assembly conducted public participation as envisaged by the applicable statutory framework.

### **Involvement of the County Public Service Board**

51. The Petitioner also challenged the appointment of the Interested Party on the basis that the County Public Service Board was not involved in the creation of the office of the County Attorney.
52. The Respondents, however, urged the Court to follow the holding by the Court in *Commission for Human Rights and Justice v Michelle Bibi Fondo & 2 Ors* that:

under the design of section 5(1) of the Office of the County Attorney Act, ... the Public Service Board, Kilifi County Government is not involved in the recruitment, approval and appointment of the County Attorney. The Court further considers that by section 5(1) providing that the County Attorney shall be appointed by the Governor with approval of the County Assembly, the constitutional ethos of transparency, accountability, competitiveness, suitability and merit are not thereby defeated. It is the Court's considered view that in undertaking the nomination of the County Attorney for appointment with the approval of the County Assembly, the Governor must exercise the discretion in accordance with the constitutional values and principles of public and state appointments. The Court further considers that towards achieving such constitutional values and principles, the Governor may invoke his or her own procedures or delegate to appropriate authority such as the 3<sup>rd</sup> Respondent or act in accordance with such applicable legislation (by the National or County Government) or such lawful policies and practices, for the time being in place..... This the Court finds that it was misconceived for the Petitioner to urge that for an appointment under section 5(1) of the [Office of the County Attorney Act, 2020](#), the 3<sup>rd</sup> Respondent had to be necessarily involved within the mandate as vested in the 3<sup>rd</sup> Respondent under the [County Governments Act, 2012](#) to create offices; declare and publicly advertise vacancies; and, to undertake competitive recruitment (interviews) and selection of the successful candidate. In any event the Court hold (sic) that the County Attorney's office is already expressly established by the Act and nothing more was needed to create the office or position.

53. This Court agrees with the holding in the Fondo case that since the office of the County Attorney is established under statute, the Office of the County Attorney Act, there was no valid or legal requirement for the County Public Service Board to establish the office.

### **Conclusion and Orders**

54. The process leading to the appointment of the Interested Party as the County Attorney was marred by failure to observe the requirements of sections 5(1) and 8(a) of the [Public Appointments \(County Assemblies Approval\) Act](#).
55. The Court therefore makes the following orders:
- i. A declaration is hereby issued that the appointment of the Interested Party 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](#).
  - ii. An order of certiorari is hereby issued to quash the appointment of the Interested Party as County Attorney of the Kisii County Government.



56. The Petitioners are denied costs for failing to comply with Court directives and not offering any explanation.

**DELIVERED VIRTUALLY, DATED, AND SIGNED IN KISUMU ON THIS 24<sup>TH</sup> DAY OF JANUARY 2024.**

**Radido Stephen, MCI Arb**

**Judge**

Appearances

For Petitioners Sam N. Mainga & Co. Advocates

For 1<sup>st</sup> to 4<sup>th</sup> Respondents Odhiambo Oronga & Co. Advocates

For 5<sup>th</sup> to 7<sup>th</sup> Respondents Onserio Ondimu, Advocate, County Assembly of Kisii

Interested Party Odhiambo Oronga & Co. Advocates

Court Assistant Chrispo Aura

