



**Gor & another v Principal Secretary/Interior and Citizen Services &
4 others (Employment and Labour Relations Petition E204 of 2021)
[2024] KEELRC 242 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 242 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E204 OF 2021
NJ ABUODHA, J
FEBRUARY 9, 2024**

BETWEEN

EVANCE OTIENO OLOO GOR 1ST PETITIONER

MICHAEL KOJO OTIENO 2ND PETITIONER

AND

**PRINCIPAL SECRETARY/INTERIOR AND CITIZEN SERVICES 1ST
RESPONDENT**

**CABINET SECRETARY, MINISTRY OF INTERIOR & CO-ORDINATION,
NATIONAL GOVERNMENT 2ND RESPONDENT**

PUBLIC SERVICE COMMISSION 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

MINISTRY OF FINANCE & NATIONAL TREASURY 5TH RESPONDENT

JUDGMENT

1. The Petitioner through a Petition dated 10th December, 2021 alleged inter alia;
 - i. That the Petitioners are human rights defenders and strong believers in the rule of law and constitutionalism. That the Petitioners were promoting democratic governance, economic development and prosperity.
 - ii. That the Petitioners relied on constitutional provisions to base their locus in this Petition and jurisdiction of the court.
 - iii. That the facts relied upon in this Petition are based on the appointments made with regard to the newly appointed Assistant County Commissioners posted in respective county



headquarters in various counties across the country. That the said appointments were carried out through a correspondence dated 15th September, 2021 signed by the 1st Respondent.

- iv. That the total number of persons appointed was not commensurate to the number of positions advertised for which were 450 posts and not 636.
 - v. That the Petitioners were aggrieved that to achieve undeclared collateral purpose of defeating resolutions with regard to the positions advertised for which were 450 and increasing them by 186 was against national values and principles of good governance as well as the purports of [Public Service Commission Act](#) and its regulations.
 - vi. The Petitioners were aggrieved that the 1st, 2nd and 3rd Respondents impugned actions were *ultra vires* and therefore invalid, null and void.
 - vii. The Petitioners averred that the law envisages for competitive, transparent, fair and open manner that conforms to all constitutionality required procedures, written reasons and notices were not made to consumers of Kenya under Article 46 and brought to their attention or varied within the confines of the law on administrative measures taken. No addendum advert was made on increasing the number to over 450.
 - viii. The Petitioners averred that the actions of 1st, 2nd and 3rd Respondents to list more than the expected number advertised for may allow for hand picking of persons, compromised subservient ocolytes of the appointing authority who may be unable to assert desired operational autonomy in the public office to reward his own cronies and 2nd Respondent a room to abuse public office to reward his own cronies and the consequence being that others qualified and fit to serve are discriminated against contrary to the dictates of Article 27 of the [Constitution](#) of Kenya 2010.
 - ix. The Petitioners averred that they had legitimate expectation that when adverts are made they are demonstrable to meet constitutionally sanctioned values and principles of good governance in article 10 of the [Constitution](#).
 - x. The Petitioners averred that as per balance herein regional balancing was not met hence it was outright robbery in broad day light which could only be stopped by this court.
 - xi. That most of them have been employed on permanent and pensionable terms while other Kenyans were denied the opportunities by being informed that the job was for contract of three years renewable.
 - xii. The Petitioners averred that there was no supplementary budget approved by parliament to increase the salaries of the unbudgeted for of 186 and it is their own admission that the persons serving as assistant County Commissioners are more than 800 persons.
 - xiii. The Petitioner alleged violation of Constitution and legislation ranging from Articles 10, 27, 41, 47, 73, 206, 232 and 234 of the [Constitution](#) and section 2 of the [Exchequer and Audit Act](#), Section 52(1) of the [Leadership and Integrity Act](#), the [Public Service Act](#) and [Public service Officers ethics Act](#) specifically part 11 on code of [conduct and ethics for public officers](#).
2. The Petitioners prayed for: -
- i. A declaration that:



- a. The 1st, 2nd, 3rd, and 5th Respondent acted unconstitutionally, illegally and ultra vires when they appointed more assistant County Commissioner/Assistant Secretary Cadet V/NO 109/2020
 - b. The 1st, 2nd, 3rd, and 5th Respondents have violated Articles 3, 10, 41, 46, 47, 201 and 232(a),(b),(c),(d)(e) and (f) together with section 10 of Public Service(Values and Principles) Act.
 - c. Reference(Ref:MICN.SEC.5/9 letter dated 15th September,2021 and the list attached is void.
 - d. The decision by the 1st, 2nd, 3rd, and 5th Respondents to appoint Assistant County Commissioners/Assistant Secretary V/NO 109/2020 Public servants violates the rule of law and therefore is unconstitutional, invalid and null and void.
 - e. The Purported appointments made by the 3rd Respondent are unconstitutional and therefore invalid, null and void ab initio.
- ii. An Order:
- a. Quashing the 1st Respondent's letter Ref.No.MICNG.SEC.5.9 of 15th September,2021 and the list attached is invalid, null and void *ab initio*.
 - b. Directing the 3rd Respondent to re-advertise and appoint the assistant County Commissioners afresh as per the advert V/NO.109/2020 in strict compliance with the law within a period of 20 days working days.
 - c. Declaring that the 1st Respondent herein is unfit to hold a public office.
 - d. Declaring that the 5th Respondent do issue in a wider circulated notice to the members of the Public revoking any further payments to the list of persons herein.
 - e. Costs of the suit be provided for.
3. The Respondents by reply to the Petition in their Replying Affidavit sworn on 5th May, 2023 alleged inter alia that;
- i. The Respondents denied the allegations of the Petition and averred that under the Constitution, the National Government Co-Ordination Act and other relevant laws, the Government of Kenya has a responsibility to provide certain critical services to the people of Kenya. These include security which is one of the key mandates of the Assistant County Commissioner Cadets whose recruitment forms- the substratum of this matter.
 - ii. The Respondents averred that the Petition and its affidavit should be dismissed in limine on the basis that they were frivolous, scandalous and mischievous and an abuse of the process of this Honourable court for reasons that the Petitioners have not provided any evidence to support their allegations.
 - iii. The Respondents averred that the Petitioners allegations that the appointment of Assistant County Commissioner/Assistant Secretary vide advertisement number V/NO 109/2020 violates the rule of law and therefore unconstitutional is not supported by any evidence and therefore made in bad faith.
 - iv. That the recruitment and selection process was conducted in accordance with the provisions of the Constitution and the laid down regulations.



- v. The Respondents averred that the 1st and 2nd Respondents through the Ministry of Interior and Co-ordination of National Government(as it then was) requested for authority to recruit six hundred(600) candidates for the position of Assistant County Commissioner-Cadets against existing vacancies in the establishment during the 2019/2020 financial period vide letter reference number ESTA 12/5 Vol. VI(68) dated 22nd January,2020 which was approved by the Public Service Commission vide letter Ref. No. PSC/2/1(6) dated 27th January,2020 which stated as follows;
 - a. That four Hundred and fifty(450) vacancies of the six hundred be reserved for entry level graduates to cater for youth unemployment.
 - b. That the remaining one hundred and fifty(150) vacancies be filled by the Chiefs/ Assistant Chiefs Who have the requisite qualifications through suitability interviews.
- vi. The Respondents averred that the 5th Respondent gave its approval for filling of the vacant positions in the financial year 2020/2021 vide their letter Ref.RES.1021/19/01 A (57) of 15th April,2020 as requested vide a letter dated 22nd Janaury,2020.
- vii. That consequently during the financial year 2020/2021 and 2021/2022 the Public Service Commission appointed a total of Seven Hundred and Nine(709) candidates to the post of Assistant County Commissioner (Cadet) Assistant Secretary Cadet Job Group J/CSG 11 vide various authority.
- viii. That a total of forty one (41) candidates were appointed vide Public Service Commission authority: PSC/54/10/1/1: PSC/54/10/1(19) dated 21st December,2021 to fill vacancies which were not taken up by the candidates appointed above.
- ix. That the additional staff appointed to the post of Assistant County Commissioners (Cadet) Assistant Secretary Cadet Job Group J/CGS 11 during the Financial period 2020/2021 and 2021/2022 addressed issues raised in letter Ref ESTAB 12/5 VOL.VI(68) dated 22nd Janaury,2020 which postulated expansion of the Ministry's mandate through various executive orders issued from time to time and effects of staff natural attrition.
- x. That the recruitment and selection process for the post of Assistant County Commissioners (Cadet) Assistant Secretary Cadet Job Group J/CGS 11 which closed on 2nd June,2020 were conducted by the Public Service Commission.
- xi. The Respondents further averred that there was no sustainable cause of action in law demonstrated against the 5th Respondent herein by the Petitioners.
- xii. That the resultant wage expenditure was factored in the 20/2021 budget as evidenced vide letter ESTAB 125 Vol. Vi(68) dated 22nd January,2020 when the Ministry of Interior and Coordination of National Government requisitioned the National Treasury for Approval.
- xiii. The Respondents averred that the deployment of appointed Assistant County Commissioner Cadets has already been effected as confirmed vide Ministry's letter dated 15th September,2021 addressed to all Regional Commissioners.
- xiv. That the recruitment process was based on merit and fair competition and therefore above board. That due diligence was conducted while recommending for appointment of Assistant County Commissioners/Assistant Secretary. In the end the Petitioners allegations lacks merit and are made in bad faith.



- xv. The Respondents prayed that the court finds the Petition lacks merit and warrants dismissal with costs.
4. The Petitioners filed a further Affidavit sworn on 11th October, 2023 and averred that;
- i. Beyond the instrument of appointment/*Public Service Commission Act*, the terms and conditions of the appointments are also subject to the *Constitution* and other written laws developed thereunder including statutory instruments and regulations.
 - ii. The Petition raises clear and specific violations of Constitution and the annexures filed by the Respondents in form of photo stat were not visible and confirmed their attestation that the 1st, 2nd and 4rd Respondent did not comply with the law in the appointments.
 - iii. Both replying affidavits are meritless and should be dismissed.
5. The parties agreed to dispose this Petition by written submissions.

Petitioner's Submission

6. The Petitioners filed their submissions dated 12th June, 2023 and, on the issue, whether the court had jurisdiction they relied on Employment and *Labour Relations Act* and the case of *Interim Independent Electoral Commission* (2011) eKLR. The petitioner further submitted that the issues raised in the Petition were pure employment matters reserved for this court under Article 162(a) as read with 165(5) (b) and 41(1) of the *Constitution*. They also relied on the South African Constitutional Court case of *Minister of Health and others v Treatment Action Campaign and others* (2002) 5 LRC 216 on the role of the Court to protect the integrity of the *Constitution*.
7. The Petitioners submitted that the Petition was filed in good faith pursuant to Article 3 of the *Constitution* to respect, uphold and defend the *Constitution* including constitutionalism and the general rule of law in the appointment of persons to public offices by those authorized in law to make the appointments.
8. According to Counsel, the *Constitution* contemplates Public Interest Litigation as a tool to implement and defend the *Constitution*, to secure and preserve the rights and fundamental freedoms in the bill of rights. Such a suit could be filed even by persons not directly affected. They relied on the case of *Peoples' Union for Democratic Rights & Others v Union of India & Others* (1982) 3 SCC 235 on Public Interest litigation.
9. The Petitioners relied on section 37(1) of the *Public Service Commission Act* and Article 260 of the *Constitution* on filing a vacancy in public office and submitted that the Respondents did not comply with Article 47 of the *Constitution*. They relied on the case of *Republic v Kenya Power and lighting Company Limited & Another* (2013) eKLR .
10. The Petitioners further relied on article 259 and 159(2)(e) of the *Constitution* on the public principles of transparency, competitive and merit based recruitments, participation of the people, rule of law, good governance and inclusiveness set out in article 10 of the *Constitution*.
11. On the issue of violation of the *Constitution* the Petitioners relied on the case of *Republic v Kenya National Examinations Council Ex-Parte Charles Maina Wanjibia & Another* (2016) eKLR among others to submit that the appointments went against public interest and the *Constitution* and the Respondent did not cite any law authorizing them appoint more cadets apart from the advert hence the process was a nullity.



12. The petitioners further contended that the appointments violated express prohibition against the conflict of interest under Articles 73 and 75 of the Constitution and that the doctrine of *ultra vires* and article 10(2) and 47 ensures protection of public interest by requiring that public bodies and officers act strictly within and according to law to prevent abuse of power. By not heeding to the advert herein the respondent's actions were illegal, null and void.
13. It was the Petitioners submissions that all the vacancies on the recruitment of the cadets were filed outside the structures of the Constitutional provisions and Public Service Commission Act on requirement for fair competition and merit.
14. It was their submissions that the act of employing persons exceeding the vacancies advertised for the Public Service Commission and payments made by treasury leads to wastage of public resources violating Article 201(d) of the Constitution which requires that public money be used in a prudent and responsible way.
15. It was their submissions that the Respondents' powers are spelt out in the Constitution and they did not have extra powers to make the said appointments which were illegal, invalid, null and void.

Respondents' Submissions

16. The respondents through their Submissions dated 31st October, 2023 stated on the issue of whether the appointments of the seven hundred and nine Assistant (709) County Commissioners/Assistant Secretary were a product of an unconstitutional and unlawful process, that the Petitioners' allegations were not supported by any evidence and therefore made in bad faith. They equally submitted that recruitment and selection process was conducted in accordance with the provisions of the Constitution and the laid down procedures and referred to the analogy in their replying affidavit.
17. The Respondents continued to submit that section 37(1) of the Public Service Commission Act provides that where a vacancy in a public office is to be filled, the Commission or authorized officer, would invite applications by advertising the vacancy in the Commission's website and at least one daily newspaper of nationwide coverage, the radio and other modes of communication, so as to reach as wide a population of potential applicants as possible.
18. The Respondents submitted that they placed an advertisement in the Newspaper which the Petitioners did not challenge through their Affidavits.
19. The Respondents relied on the decision of Githu Muigai & Another v Law Society of Kenya & Another [2015] eKLR and Resley v City Council of Nairobi (2006) EA on authority to exercise powers given by the Statute.
20. The Respondents submitted that Section 33(1) of the Public Service Commission Act gave the 5th Respondent unconstrained power, to engage in the processes, to be innovative and operate in a manner that will best aid it to fully discharge its constitutional mandate.
21. The Respondents submitted that on the decision not to advertise the 150 slots and have fresh recruitment process but pick appointees from the pool of Chiefs who have requisite qualifications was in accord with the values and principles of public service as espoused under Article 232 of the Constitution more specifically 232[1][b] and [c] which provide for efficient, effective and economic use of resources, and responsive, prompt, impartial and equitable provision of services.
22. The Respondents in addition submitted that not adopt such process, would lead to wastage of a colossal amount of money that not been budgeted for. The same recruitment of one Hundred and fifty was a result of a needs consideration a position the Petitioners have not controverted by any material.



23. On the issue whether the Appointed Assistant County Commissioners/Assistant Secretaries ought to have been enjoined in this petition, the respondent submitted that they ought to have been enjoined as they had since been deployed and were working in various stations. The Respondents submitted that allowing the petition would entail causing a termination of their employment and the effect on them would be monumentally prejudicial. The Respondents placed reliance in the case of *Sberia Mtaani Na Shadrack Wambui v Public Service Commission & 2 others*
24. On the issue as to whether the Respondent contravened section 4,5 and 6 of the Fair Administrative Actions Act, the Respondents submitted that the dictates of Section 4 were upheld by according the Petitioners the right to administrative action that is expeditious, lawful, reasonable and procedurally fair.
25. The Respondents further submitted that section 4(3) of the *Fair Administrative Action Act*, 2015 provides remedies as when an administrative action is likely to adversely affect the rights or fundamental freedoms of any person. The Respondents placed reliance on the case of Misc. Application No.447 of 2014; Republic v –Public Procurement Administrative Review Board & 2 others where it was stated that what was of importance was whether the decision made was a decision which the authority concerned was lawfully entitled to make.
26. On the right to fair hearing, the respondent relied on article 50(1) of the *Constitution* and the case of *Ridge v Baldwin*(1964) AC 40 which restated that the right to fair hearing was a rule of universal application in administrative acts or decisions affecting rights. Counsel further submitted that the Court need's to look at merits and the legality of the decisions as well as the process and procedure adopted as per Articles 47 and 50 of the *Constitution*.
27. Counsel further submitted that reliance on Article 10 of the *Constitution* by the Petitioners was in bad faith since the Respondents observed the national values and principles of governance as per the *Constitution*.
28. On the issue of reliefs sought by the Petitioners, it was the Respondents' submission that the claims are baseless and must be rejected.
29. Regarding conservatory orders, the respondent submitted that the same would only issue where there was real impending danger to violation of the *Constitution* or fundamental rights and freedoms with a consequence that a Petitioner or the Public at large would suffer prejudice unless the court intervenes and grants conservatory orders in order to preserve the subject matter of the dispute. This, according to the respondent was not the issue in this case. In this regard, the respondent relied on the case of *Centre for Rights Education and Awareness(Creaw) & Another v Speaker of the National Assembly & 2 Others*(2017) eKLR. The Respondents further placed reliance on among others the case of ELRC ,Kisumu Petition No. 1 of 2017, *Ntusiet Anderson Kishaine & Others v Ag and Others* where it was held that the Petitioners failed to prove that any of their constitutional rights were infringed.
30. Counsel further submitted that in the entire Petition there was no single provision of the *Constitution* that was singled out by the Petitioners to demonstrate how it was violated and the manner in which the violation occasioned harm to them. The Respondent therefore urged the Court to invoke the doctrine of Constitutional avoidance and dismiss this Petition. In support of the submission the respondent relied on the case of *Mumo Matemu V Trusted Society of Human Rights Alliance & 5 Others* (2013) eKLR among others.



Determination and Disposal

31. Having reviewed and considered the petition, the Respondent's replying affidavits, the further affidavit by the Petitioner and submissions by both counsels in support and opposition to the Petition and also having considered authorities relied on by Counsel and I have come up with four main issues;
- i. I have Aa. aa. Whether the appointment of the Assistant County Commissioners /Assistant Secretary was pursuant to a process that was unconstitutional and unlawful.
 - ii. Whether the Appointed Assistant county Commissioners/Assistant Secretary ought to have been enjoined in this petition.
 - iii. Whether the Respondents contravened the Provisions of the Constitution and other laws and whether the Petitioners have proved such violations

Whether the appointment of the Assistant County Commissioners /Assistant Secretary was pursuant to a process that was unconstitutional and unlawful.

32. Section 37 (1) of the Public Service Commission Act provides:
- “Where a vacancy in a public office is to be filled, the Commission or authorized officer shall invite the applications by advertising the vacancy in the Commission's website. At least one daily newspaper of nationwide coverage, the radio and other modes of communication, so as to reach as wide a population of potential applicants as possible.”
33. The Petitioners have claimed that the number of the advertised posts were 450 while those employed were 636 hence there was an addition of 186 persons. The Respondents on the other hand alleged that they advertised and recruited a total of 709 persons of which there was the first batch of 450 then 150 recruited from the data base.
34. There seems to be discrepancy between the parties over how many people were recruited but from the adverts and documents supplied by the Respondents it seems to be correct that they only added an addition of 150 persons from the pool of their data base. The Respondents were clear, that in conformity with the provisions of the law, the 3rd Respondent placed an advertisement in the Ministry of Interior and Coordination of National Government (State Department for Interior and Citizen Services) for the Positions of Assistant County Commissioners vide a newspaper advert V/ NO.109/2020,dated 13th May 2020.
35. The Petitioners did not challenge this, notwithstanding that it had a chance to, through the further affidavit that it filed. This leads to the conclusion that the Respondents' contention as regards the advertisement was true.
36. The Respondents illustrated that the additional one hundred and fifty recruits were done on a need basis where they resorted to the pool of Applicants who had qualified but had not gotten the chances. This according to the respondent, saved the expenses of a fresh recruitment process.
37. The Petitioners did not challenge the fact that it was on need basis. The Respondents also provided for how the additional recruits would be paid to avoid any extra cost on the government expenditure or budget.
38. Section 33(1) of the Public Service Commission Act appear to give the Respondents power to act as they acted in line with article 234(2)(a) (ii) of the Constitution as well as other powers to discharge its obligations under subsection 2 of the Act. The Court agrees with the Respondent that this was in



accord with the values and principles of public service as espoused under article 232 of the Constitution concerning efficient, effective and economic use of resources as well as responsive, prompt, impartial and equitable provision of services. Therefore, the appointment most specifically of the additional cadets was done legally and lawfully.

Whether the Appointed Assistant county Commissioners/Assistant Secretary ought to have been enjoined in this petition.

39. The Appointed Assistant County Commissioners/Assistant Secretary who were now deployed ought to be enjoined herein since any adverse decision in this Petition would render them terminated yet they were not part of this Petition. I agree with the court in case of Sberia Mtaani na Shadrack Wambui v Public Service Commission & 2 others(2021) eKLR that:-

The Respondents asserted that the recruited accountants were subsequently deployed and that they are now working in various stations within the Republic. They are therefore in service currently. Allowing the petition would entail causing a termination of their employment. The effect on them would be monumentally prejudicial. In proceedings that would have such an effect on a person, it would not be proper for them to be proceeded with and concluded, without involving that person[s]

Whether the Respondents contravened the Provisions of the Constitution and other laws and whether the Petitioners have proved such violations

40. The Petitioners have relied on public interest litigation as their legal basis for this Petition. The Respondents on the other hand maintained that the Petitioners did not demonstrate with precision how their fundamental rights and freedoms were infringed by the Respondents.

41. Whereas I agree that the Petitioners could bring this Petition as public interest litigation, the Petitioners needed to show how the alleged infringements adversely affected the public at large. The assertion that the additional recruits would cause the Government costs not budgeted does not hold water since Respondents explained themselves why the hiring of the extra recruits was important and how their payment would not affect their budget. The Court in this respect relies on the decision in the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others(2013) eKLR where it was held that constitutional petitions ought to be pleaded with precision:

“It is our finding that the petition before the High Court was not pleaded with precision as required in constitutional petitions. Having reviewed the petition and supporting affidavit, we have concluded that they did not provide adequate particulars of the claims relating to the alleged violations of the Constitution of Kenya and the *Ethics and Anti-Corruption Commission Act, 2011*. Accordingly, the petition did not meet the standard enunciated in the Anarita Karimi Njeru case (*supra*)”

42. This leads to the Conclusion that the Petitioners have not established a prima facie case against the Respondents with the consequence that the petition is found unmerited and is hereby dismissed with not order as to costs.

43. It is so ordered

DATED AT NAIROBI THIS 9TH FEBRUARY, 2024

DELIVERED VIRTUALLY THIS 9TH FEBRUARY, 2024

ABUODHA NELSON JORUM



JUDGE

