



Tum v Public Service Board of Kericho County & 2 others; Chelangat & 11 others (Interested Parties) (Petition E014 of 2022) [2024] KEELRC 104 (KLR) (1 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 104 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
PETITION E014 OF 2022
DN NDERITU, J
FEBRUARY 1, 2024**

BETWEEN

VICTOR KIPNG'ENO TUM PETITIONER

AND

THE PUBLIC SERVICE BOARD OF KERICHO COUNTY 1ST RESPONDENT

**HON. ERICK KIPKOECH MUTAI GOVERNOR KERICHO COUNTY
GOVERNMENT 2ND RESPONDENT**

THE COUNTY ASSEMBLY OF KERICHO 3RD RESPONDENT

AND

ROSEMARY CHELANGAT INTERESTED PARTY

DAVID KURGAT KIPLANGAT INTERESTED PARTY

WILLY RONO KIPRONO INTERESTED PARTY

MICHAEL BETT KIPROTICH INTERESTED PARTY

WESLEY KOECH INTERESTED PARTY

JAPHET CHERUIYOT INTERESTED PARTY

RICHARD TONUI KIBET INTERESTED PARTY

GEOFFREY KIPNGENO BETT INTERESTED PARTY

ALPHONCE ROTICH KIPKURUI INTERESTED PARTY

ANDERSON TERER CHERUIYOT INTERESTED PARTY

BETSY CHEBET INTERESTED PARTY

GILBERT KIPKURUI BII INTERESTED PARTY



JUDGMENT

I. Introduction

1. The Petitioner, acting in person, commenced these proceedings by way of a petition dated 24th November, 2022 filed in court on even date.
2. Subsequently, on 11th January, 2023 the petitioner filed an amended petition seeking the following –
 1. A Declaration be and is hereby issued that, the recruitment of the Chief Officers for the County Government of Kericho was unconstitutional null void *ab initio*.
 2. A Declaration be and is hereby issued that the 1st Respondent violated Article 10, 35, 73, 232 and Section 65 of the County Government Act, 2012 during the recruitment process, deeming the whole process a nullity.
 3. That a Declaration be and is hereby issued that the 1st Respondent is bound to apply the provisions of the Constitution and particularly Articles, 2, 3, 10, 27, 35, 73 and 232 in the recruitment of the Chief Officers for the County Government of Kericho during any recruitment exercise it conducts.
 4. That a Declaration be and is hereby issued that the 1st Respondent erred in failing to publish long list and or the shortlist of the applicants, the date, time and venue of the interview for the applicants for appointment to the position of the Chief Officers for the County Government of Kericho.
 5. That a Declaration be and is issued to the effect that the process of recruitment of the Chief Officers were undertaken by the 1st Respondent was unconstitutional, null and void *ab initio*.
 6. That a Declaration be and is issued to the effect that the 1st and 2nd Respondent recommendation of nominees of more than 2/3 or 66.7% of male gender and less than 1/3 or 33.3% of female gender for approval and eventual appointment as Chief Officers is gender insensitive, discriminatory against women, disrespectful of women and contrary to Articles 27, 2, 3, 10, 174 of the Constitution of Kenya and is therefore null and void.
 7. Consequently, upon the above prayers hereinabove, an Order compelling the 1st Respondent to forthwith re-start the recruitment process and recommend to the Governor for Kericho County, for appointment of Chief Officers a two-thirds gender complaint list of candidates, competitively, transparently, fairly, through public participation and in an open manner, interview, and choose the best candidates for the position of Chief Officers within the spirit and meaning of Chapter 6 on leadership and integrity, Article 10(2)(a)(c), 73, 232 of the Constitution of Kenya, 2010 as well as Section 65 of the County Government Act, 2012 which provides for participation of the people in good governance, integrity, transparency and accountability and Article 35 of the Constitution of Kenya, 2010 which provides for the right of the people to access important information affecting the nation.
 8. That this Honourable court be pleased to issue any other or further remedy that the Honourable court shall deem fit to grant.
 9. Costs of the petition be borne by the Respondents.



3. The petition is expressed to be anchored on Articles 2, 3, 10, 22, 27, 33, 35, 47, 48, 258 of the Constitution, alongside various provisions of international conventions, treaties, and protocols as recognized under Article 2(5) & (6) of the Constitution.
4. The amended petition is accompanied with a supporting affidavit sworn by the Petitioner on even date with several annexures thereto.
5. The facts and the law relied upon are set out in the body of the petition and the same shall be recited and analyzed in the succeeding parts of this judgment.
6. Alongside the original petition was filed a notice of motion of even date wherein the petitioner prayed that the respondents be barred from recruiting the interested parties into office and for preservation of the status quo ante but the said application was withdrawn in favour of the hearing of the amended petition as the application was deemed to have been overtaken by events, as shall be discerned hereinafter.
7. Upon service, the 1st and 2nd respondents, represented by Gordon Ogola, Kipkoech & Co. Advocates, filed a replying affidavit sworn by Charles Chirchir, the secretary of the 1st respondent, who also swore a supplementary affidavit (erroneously termed a replying affidavit).
8. There is no response on record from the 3rd respondent in regard to the amended petition as the only replying affidavit filed was in response to the initial petition and the application that was withdrawn.
9. When the matter came up in court for directions on 31st January, 2023 it was agreed and directed that the petition be canvassed by way of written submissions. Thereafter, the petitioner filed his written submissions on 14th February, 2023, while counsel for the 1st and 2nd respondents, Mr. Kipkoech, filed his written submissions on 10th March, 2023. There are no submissions on record for the 3rd respondent and the interested parties.

II. The Petitioner's Case

10. The petitioner's case is based on the filed amended petition, the supporting affidavit and the annexures thereto, and his written submissions, and the same is summarized as hereunder.
11. The petitioner describes himself as an active and law-abiding citizen with a passion for respecting, upholding, and defending the Constitution on his own behalf and for and on behalf of the public in accord with Articles 3 and 22 of the Constitution.
12. After reciting the various provisions of the Constitution, international conventions, treaties, and protocols, the petitioner sets out the facts relied upon as follows. That on or about 2nd September, 2022 the County Government of Kericho through the 1st respondent advertised in the local dailies and on its website calling for applications from suitably qualified persons for the position of chief officers in the various departments of the said county government. The petitioner's curiosity was aroused and he hence kept his eyes and ears on the process.
13. The petitioner alleges that on 4th November, 2022 the 2nd respondent submitted names of 12 recommended nominees to the 3rd respondent for the vetting and subsequent appointment to fill the positions alluded to above. It is the petitioner's case that the public and more so citizens of Kericho County were kept in darkness and that the entire recruitment process, from the time of advertisement to the time of submission of the names of the nominees was opaque, secretive, un-procedural, and unlawful.



14. The petitioner takes the view that the recruitment process lacked in transparency and accountability as envisaged in the principles of governance under Article 10 of the Constitution and ultimately the said nomination, vetting, and the subsequent appointments of the interested parties failed to consider the two-third gender rule and completely ignored representation of the minorities in the cosmopolitan County of Kericho.
15. It is therefore pleaded that the respondents violated various provisions of the Constitution, Access to Information Act, County Governments Act, and Fair Administrative Action Act and as such the entire process fails the test of openness, fairness, competitiveness, and transparency. It is therefore submitted that the entire process is null and void, *ab initio*.
16. It is submitted that the entire process of recruiting the 12 chief officers was “unconstitutional, unjustified, unlawful, capricious, unreasonable, irrational, malicious, biased, unilateral, made in bad faith” for failing to abide by the two-third gender rule and failing to consider minorities. It is pleaded that the 12 interested parties were cherry-picked and handed the positions without due process.
17. The foregoing contents of the petition are reiterated and reproduced in the supporting affidavit and the court is urged to allow the petition in terms of the prayers reproduced in the introductory part of this petition.

III. The 1st & 2nd Respondents’ Case

18. The case for the 1st and 2nd respondents is entailed in the replying affidavit of Charles K. Chirchir, the Secretary/CEO, the supplementary affidavit by the same deponent, and the submissions by their counsel; it is as summarized as follows.
19. It is deposed that as per the law the county chief officers (CCOs) are recruited by the county public service board, nominated by the governor, vetted by the county assembly, and ultimately appointed by the governor, in accordance with various provisions of the County Governments Act, notably Sections 45, 57, and 59. Further, it is deposed that the respondents complied with the law as cited above and the various constitutional provisions on principles of governance cited in an earlier part of this judgment.
20. Annexed to the affidavit is an advert for the vacancies dated 2nd September, 2022, and a list of the shortlisted candidates. It is stated that the shortlisting was done between 22nd and 30th September, 2022 and the interviews conducted from 11th to 28th October, 2022, and the list of the interviewed candidates and their attendance for each docket is attached. It is deposed that after the interviews a report that is attached and exhibited was prepared in a forum held between 31st October and 4th November, 2022.
21. It is deposed that the nominees were subsequently vetted by the 3rd respondent and appointed by the 2nd respondent in accordance with the law cited elsewhere in this judgment.
22. It is deposed that if the petitioner or indeed any other person had any objection to the nomination, vetting, and appointment of any of the interested persons, such objection ought to have been addressed to the 3rd respondent as provided for in the law. It is deposed that in the entirety of the petition no objection has been raised against the qualifications or the suitability of any of the appointees.
23. It is deposed that the petitioner has not demonstrated with a degree of certainty and precision the particular provisions of the Constitution and the law that were allegedly violated in the above process which according to the respondents was strictly executed in accordance with the law.
24. In response to the allegation that the appointments failed to meet the two-thirds gender rule it is stated that the respondents nominated and appointed the most qualified candidates and that in any event the



rule is to be realized gradually and progressively as per the opinion of the Supreme Court *In the Matter of the Principle of Gender Representation in the National Assembly & the Senate* [2012] eKLR. It is further deposed that the Parliament is yet to legislate on a law to guide on achievement and realization of the two-thirds gender rule.

25. In the supplementary affidavit filed with leave of the court it is deposed that the interested parties upon nomination were vetted and appointed in accordance with the law and as such the petition is said to have been overtaken by events.
26. It is further deposed that in Nakuru ELRC Petition No. E013 of 2022 filed by Cherotich Khatherine against the same respondents herein, over the same subject matter, this court adopted a consent that declared the entire recruitment process of the interested parties herein to have been lawful and constitutional and as such the court is urged not to re-decide the same issues and probably and unlawfully arrive at a different conclusion. A copy of the said consent is attached and exhibited.
27. For all the foregoing reasons, the court is urged to dismiss the petition in limine. The submissions by their counsel shall be considered in the succeeding parts of this judgment.
28. There is on record a replying affidavit that was sworn by Gideon Mutai, the County attorney, on 15th December, 2022 purportedly for and on behalf of the 2nd respondent and all the interested parties but the court notes that the same was in response to the original petition and the accompanying application, and not in response to the amended petition which was filed on 11th January, 2023. The court therefore need not comment on the contents thereof.

IV. Submissions

29. The written submissions by the petitioner and Mr. Kipkoech for the 1st and 2nd respondents have majorly dealt with two issues – Whether this petition is properly before the court (whether this court has jurisdiction to entertain the petition), and, Whether the petition meets the required constitutional threshold as to entitle the petitioner to the reliefs sought.
30. In the circumstances, the court shall consider and analyze the issues that commend themselves to the court for determination as hereunder.

V. Issues For Determination

31. I have read and understood the various positions taken and postulated by the parties in this petition. From the foregoing summary of the pleadings filed, the evidence placed before the court, and the submissions by or for the parties, the following issues commend themselves to the court for determination –
 - i. Is this petition properly before the court and or does this court possess the requisite jurisdiction to hear and determine this petition?
 - ii. If (i) above is in the affirmative, is the petitioner deserving of the reliefs prayed for?
 - iii. Costs

VI. Jurisdiction

32. The outcome of the first issue shall determine if the court needs to tackle the second issue. To paraphrase Nyarangi J in the celebrated *Owners of the Motor Vessel Lilian "S"* case, jurisdiction is everything and a court that indulges in a matter without jurisdiction labours in vain. Once the jurisdiction of a court in a matter is questioned the court has to deal and determine that issue on priority



- basis. Once a court determines that it has no jurisdiction in a matter, it has to down its tools and make no more one step. Such is the centrality of jurisdiction that when and where a court makes or issues orders without jurisdiction such pronouncements amount to mere nullities that are void ab initio.
33. Obviously, the jurisdiction of a court is derived from the *Constitution*, statutes, or both, or from precedents in rare instances – See *Samuel Kamau Macharia & Another v Kenya Commercial Bank & Another* [2012] eKLR.
 34. While this matter was pending for judgment the 1st and 2nd respondents filed a notice of motion dated 22nd May, 2023 seeking inter alia to arrest the judgment to allow the court time to consider a ruling from the Court of Appeal in Nakuru Civil Appeal No. E136 of 2022 as consolidated with No. E137 of 2022 (the Court of Appeal decision) wherein the Court of Appeal delineated the jurisdiction of this court (ELRC). It is the respondents’ position that this court does not possess the requisite jurisdiction to hear and determine the issues raised in the instant petition in view of the holding of the Court of Appeal in the above petitions.
 35. However, this court was by then aware of the said judgment of the Court of Appeal in the above matters as the decisions appealed against had emanated from a decision of this court and as such, while the application reminded this court of the said judgment from the Court of Appeal, this court was to apply the same herein, anyway.
 36. Now, the nature and substance of a petition or a cause is discerned from the pleadings and more so the reliefs sought. The petitioner is seeking the reliefs set out in the introductory part of this judgment. The petitioner is asking the court to declare null and void the recruitment and appointment of the interested parties herein as CCOs on two major grounds. Firstly, that the process of recruitment was flawed and, secondly, that once concluded the appointments did not meet the constitutional two-thirds gender rule. In the understanding of the court these are the two elementary issues in the petition that this court has to internalize in determining whether the court has the jurisdiction to hear and determine the same.
 37. The ELRC is promulgated under Article 162(2)(a) of the *Constitution* and established under the *Employment and Labour Relations Court Act* (ELRC Act) with the specialized mandate and “exclusive original and appellate” jurisdiction to hear and determine matters employment and labour relations.
 38. In the Court of Appeal decision cited above it was held that ELRC has no jurisdiction to hear and determine matters, even if related or coincidental to employment and labour relations, if and where an employer-employee relationship has neither crystallized nor created. The respondents in the two consolidated appeals (the petitioners in the trial before this court) faced a similar situation to the petitioner in the instant petition and approached this court to stop recruitment, including nomination, vetting, and appointment of CCOs in Nakuru County on the basis that the entire process was tainted with illegalities, irregularities, and constitutional and statutory violations. This court issued conservatory orders stopping the recruitment process pending the hearing and determination of the application inter partes and thereafter pending the hearing and determination of the petition.
 39. The Court of Appeal took the view, with which this court does not resonate but nonetheless binding, that unless and until an employer-employee relationship has been created this court has no jurisdiction to entertain a matter. The Court of Appeal took the view that the respondents ought to have exhausted the preliminary statutory mechanism provided for under Section 77 of the *County Governments Act* before approaching the court. Further, the Court of Appeal held that Sections 85, 86, and 87 of the *Public Service Commission Act* are couched in mandatory terms to the effect that any person dissatisfied with the decision of a county board shall appeal to the said commission.



40. The only difference between the matter appealed above and the instant petition is that the earlier matter was brought to court before appointment of the concerned CCOs. In the instant petition the petitioner amended his petition as by the time the matter came up in court the process of recruitment and appointment had been concluded and the interested parties had been appointed to the various departments as CCOs.
41. However, the contextual difference between this petition and those that gave rise to the decision by the Court of Appeal does not change the holding by the Court of Appeal that any person dissatisfied with the decision of a county board shall appeal to the Public Service Commission (PSC) in accordance with the law cited above and exhaust that mechanism before coming to court. In this regard the court finds and holds that it lacks the jurisdiction to entertain this petition based on the doctrine of exhaustion. The petitioner, according to the holding of the Court of Appeal, ought to have filed his complaints with the PSC before approaching this court or indeed any other court.
42. In a recent decision, the Supreme Court in *Abidha Nicholas V AG & Others* Petition No. E007 of 2023 held that where the preliminary mechanism in the application of the doctrine of exhaustion is likely to perpetuate unfairness or injustice, the court may issue orders to avert such injustice, on a case to case basis.
43. In the instant petition there is no evidence that the petitioner exhausted the statutory out of court mechanism cited in section 77 of the *County Governments Act* and Sections 85, 86, & 87 of the *Public Service Commission Act*. There is no evidence in the pleadings, including the supporting affidavit, or even a mention in the submissions, that the petitioner attempted to invoke the said mechanism. No reason has been given as to why the petitioner approached the court without first invoking the said mechanism so as to persuade the court to consider the exceptions to the doctrine of exhaustion as illuminated by the Supreme Court in the *Abidha Nicholas* decision cited above. Again, on this score the petition shall fail for lack of jurisdiction.
44. The process of recruitment of the interested parties – from advertisement of the vacancies, shortlisting, interviewing, nomination, submission of names, vetting, and appointment – have been enumerated and detailed by the 1st and 2nd respondents in their replying affidavit and the submissions by their counsel. There is no evidential response or rebuttal from the petitioner to the said details and particulars. The court can only assume and hold that the evidence is unchallenged.
45. Further, the petitioner has not challenged the qualifications and suitability of the interested parties for appointment to the said positions. Conversely, what is contested, and vehemently so, is the male-dominance in the said appointments which otherwise offends the two-thirds gender rule.
46. The two-thirds gender rule has been a hot potato for a while now both in courts and in the court of public opinion. Both the petitioner and counsel for the 1st and 2nd respondents have submitted extensively on this issue and cited various court decisions and pronouncements on the same. For example, the Supreme Court *In the matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR noted that the Parliament ought to pass a law to give effect to the two-thirds gender rule to enable and operationalize the implementation of the same. Likewise, the court decried lack of legislation to guide and help the implementation of the two-thirds gender rule in *Federation of Women Lawyers Kenya (FIDA -K) & 5 Others v Attorney General & Another* [2011] eKLR.
47. This court shall not engage in the now rigorous discourse on how the two-thirds gender rule shall be achieved and or implemented. The question or issue that concerns this court at this point is whether that is an issue that can be properly canvassed in this court. In other words, can this court properly



address itself to the issue and nullify appointments, as I have been requested to do in this petition, on the grounds that such appointments failed to accord with the two-thirds gender rule?

48. The jurisprudence from the Supreme Court is that the rule is to be achieved gradually and progressively given the historical and cultural issues connected and appurtenant thereto in our paternally-biased societal settings and undertones.
49. However, the court holds the view that the issue is not properly before this court. Firstly, the issue is not one of those set out for determination between an employer and an employee under the jurisdiction of this court based on the law cited in an earlier part of this judgment. Secondly, as far as the court knows there is no law on the implementation, governance, and administration of the two-thirds gender rule. Where and when vacancies are advertised for all and sundry to apply, as it happened in the circumstances giving rise to this petition, and only the suitable and best candidates are shortlisted, interviewed, nominated, vetted, and appointed, how and on what grounds may this court interfere, annul, and set aside such appointments? That is the lacuna that the intended legislation was intended to cater for and cure.
50. While it is not denied by the respondents that the list of the appointed interested parties is male-dominated, it is not demonstrated by the petitioner that suitably qualified female and or minority candidates who applied were unfairly left out and or discriminated. This is where the intended law should have provided for remedies in case of violation of the two-thirds gender rule. The courts, including the Supreme Court, have challenged the Legislature to pass the necessary law to no avail. This has created a state of confusion to the extent that Maraga CJ (emeritus) at some point called upon the President to dissolve the Parliament for its failure to enact the law. It would appear the ball is now in the court of the Legislature as the intended gradual migration towards attainment of the two-thirds gender rule has gradually come to a halt due to lack of the necessary statute.
51. This court has its hands tied and unable to pronounce itself on this issue for two reasons. Firstly, the two-thirds gender rule has been litigated to the highest court without a resolution other than a recommendation and a call to the Parliament to pass the requisite law to aid and guide in the implementation of the same. Secondly, there is no evidence that suitably qualified female candidates and or minorities were discriminated as to render the entire process flawed or biased in a certain way. Last but not least, the implementation of the two-thirds gender rule is a constitutional issue that has been litigated to the highest court without a resolution due to lack of the proper legislation and as such the key to unlocking the issue lies with the Legislature and not with the Judiciary. May be, in the circumstances, the petitioner should, and am not sure if he will be the first one to do so, petition the Parliament to do the needful in the hope of having this issue settled once and for all.
52. For now, for all the reasons expounded above, this court lacks the jurisdiction to deal with the matter as the same is purely not an employment and labour relations matter but a constitutional issue affecting all public institutions at county governments and the national government level, both in elective and appointive positions.
53. For all the foregoing, it is the opinion and holding of this court that it lacks the jurisdiction to hear and determine the issues raised in the petition.
54. In the circumstances, it is not deemed necessary for the court to deal with the other issues on the merits of the petition as such a venture shall be purely academic. The petition is hereby dismissed.



VII.Costs

55. Costs ordinarily follow the event. However, the petitioner filed this petition not for his personal gain or benefit but in the interest and furtherance of rule of law in the realm of public-spirited litigation. For this reason, there is no order as to costs.

VIII.Orders

56. Flowing from the foregoing and in disposal of this petition the same is hereby dismissed with no orders as to costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 1ST DAY OF FEBRUARY, 2024.

.....

**HON. DAVID NDERITU
JUDGE**

