



Onoka & another v Ministry of Interior and Coordination of National Government & 4 others (Petition E033 of 2023) [2024] KEELRC 758 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 758 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E033 OF 2023**

**CN BAARI, J
APRIL 11, 2024**

BETWEEN

ROSE ONOKA 1ST PETITIONER

LOWER KADONGO WOMEN GROUP 2ND PETITIONER

AND

**THE MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL
GOVERNMENT 1ST RESPONDENT**

THE PUBLIC SERVICE COMMISSION 2ND RESPONDENT

JOSEPH OTIENO OYOO 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

THE COUNTY COMMISSIONER KISUMU WEST 5TH RESPONDENT

JUDGMENT

1. The Petitioners, Rose Onoka and Lower Kadongo Women Group, filed this petition against the five Respondents named herein, following the decision to appoint the 3rd Respondent to the position of Assistant Chief for Lower Kadongo. Under the petition, they seek the following reliefs:
 - a. A declaration that the appointment of the 3rd Respondent is null and void ab initio on grounds that he never participated in the recruitment process.
 - b. An order compelling the Respondents to appoint the candidate who was recommended by the county commissioner as per the outcome of the interview.
 - c. A declaration that the Respondents be directed to re- advertise the position and fill the same in accordance with the criteria and qualifications in the advertisement within 30 days.



- d. A writ of *certiorari* be issued calling into this Honourable Court the 1st Respondent's decision to appoint the 3rd Respondent for the purposes of being quashed, and by the same writ the Decision be quashed
 - e. Costs be provided for.
2. The Court issued conservatory orders on 11th December, 2023, against the 3rd Respondent's assumption of office, pending determination of the application, and further directed parties to file their respective submissions on the application.
 3. The matter came up for mention for directions on 6th February, 2024, when the Respondents indicated that they were not opposed to the Petitioners' application, and directions issued on filing of submissions on the main petition.
 4. Submissions were filed for the parties, except the 2nd Respondent, who indicated that recruitment of chiefs and their assistants is a delegated function, and would therefore not be filing submissions in the matter.
 5. The submissions filed, also addressed the Petitioners' contempt motion dated 15th January, 2024.

The Petitioners' submissions

6. The Petitioners brought out four issues for the court's determination in the petition. The first issue is whether the petition meets the threshold of a Constitutional case, and which they answered in the affirmative. They submit that the petition is properly before the court according to Rule 7 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#) read together with the [Constitution, 2010](#) and the Rules thereto.
7. It is their submission that the petition is premised on the alleged contravention of rights and fundamental freedoms under Articles 10, 22, 23, 27, 35, 41, 47, 159, 162 (2) (a), and 165 (3) (b) of the [Constitution, 2010](#). They submit further that the Respondents also violated Sections 10, 13 (1), 17, 37, and 41 of the [Public Commission Service Act](#), and the [Employment Act](#).
8. It is their assertion that by virtue of the fact that the petition enumerates various Articles of the [Constitution](#) said to have been contravened by the actions and conduct of the Respondents, and given particulars thereof, the petition meets the threshold set in [Anarita Karimi Njeru v Republic \(1976-1980\) KLR 1272](#).
9. It is the Petitioners submission that in appointing Mr. Joseph Otieno Oyoo as the Assistant Chief of Lower Kadongo, Kisumu West Sub-County, Kisumu County, the Respondents contravened the [Constitution](#), specifically Article 10, which states that National values and Principles of Governance ought to be upheld.
10. It is their case that the name of the person appointed (3rd Respondent) was missing from the list containing the shortlisted applicants, thus raising eyebrows on where such a name arose from during the appointment, and put to question the seriousness of government in appointment for public officers. The Petitioners sought reliance in High Court Judicial Review Miscellaneous Application No 44 of 2012 [Republic v The Attorney General & another ex parte James Alfred Koroso](#), for the holding that;

“Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya...Public officers must remember that under Article 129 of the [Constitution](#), executive



authority derives from the people of Kenya and is to be exercised per the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit"

11. On the issue of whether the appointment of the 3rd Respondent is unconstitutional, the Petitioners submit that the corrigendum rectifying the name forwarded for appointment came too late, having been sent almost 3 months after the close of the interview, and may have been intended to sanitize the irregularities that marred the appointment process, which in their view, rendered the recruitment and appointment unlawful and illegal.
12. It is the Petitioners' further submission that the Respondents should not rely on the fact that they prepared a corrigendum to rectify the mix-up of names as a defense herein, especially given that they went ahead and installed the 3rd Respondent into office despite issuance of a conservatory order with clear instructions not to do so.
13. The Petitioners submit further that the 5th Respondent has not sufficiently explained the factual and legal basis of the corrigendum, and urge this court to find that the corrigendum prepared by the 5th Respondent did not absolve the Respondents from the sanctions that the law provides on account of their unlawful actions on the entire appointment process.
14. It is submitted for the Petitioners that political influence and/or intimidation was one of the factor that jeopardized the integrity of the exercise, and that interview questions were leaked days before the interview.
15. In concluding, the Petitioners urged the court to find that the entire recruitment and appointment exercise fell short of the legal provisions in place, and order that the recruitment and appointment be conducted afresh in the interest of justice.

The 1st, 4th and 5th Respondents' Submissions

16. It is the Respondents' submission that the recruitment process was conducted in a proper manner and all the requirements followed, thus no Constitutional right was violated.
17. They submit further that the Principal Secretary has discretionary power to pick either of the three candidates recommended by the interviewing panel, and is not bound by the recommendation of the 5th Respondent.
18. It is submitted that Article 234 (2) (g) of the Constitution provides that the Public Service Commission shall review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service, and that it is pursuant to this Constitutional power that the 5th Respondent forwarded minutes dated 14/ 8/2023, containing their recommendation and remarks together with the merit list to the Regional Commissioner, for onward transmission to the Ministry of Interior and Coordination of National government, seeking authorization to effect the appointment.
19. The Respondents submit that the Petitioners did not fault the procedure adopted, but the substance of the appointment. They confirm that there was a disparity in the name per County Commissioner's communication vide letter dated 27th November, 2023, where Joseph Okulo Ayoo was inadvertently referred to as Joseph Otieno Oyoo.
20. It is their further submission that the 5th Respondent noted the mix-up and immediately prepared a corrigendum and the correct name was captured to read Joseph Okulo Ayoo vide letter dated 8th December, 2023 addressed to the Regional Commissioner.



21. The Respondents maintain that the procedure was backed by law and therefore the Petitioners have no claim as against the Respondents. They submit that the general evidentiary standard applicable in judicial review of the procedural propriety of an appointment process, is that there must be a showing by the Claimant that there were substantive defects in that procedure, had fundamental omissions, or a consideration of extraneous considerations as to render the cumulative process unconstitutional. Reliance was had to the case of *Kenya Youth Parliament & 2 others v Attorney General & 2 others* 2012) eKLR where the court opined thus:

“They [the Petitioners] failed to show any defects in that procedure and process. There was no evidence that all the allegations, complaints and all matters complained of as against the 2nd Respondent were not considered by all the organs. the *Constitution* vests different functions to different organs and to ask this Court to fault process by those organs without presenting material to prove any wrong doing, is to ask the court to usurp the functions of those organs.”
22. In their response to the allegations of contempt, the Respondents submit that they have not received any acceptance letter from Joseph Okulo Ayoo, and neither has the panel prepared any documents to confer his appointment, and therefore, no assistant chief has been installed.
23. It is their further submission that only the County Commissioner, his deputy or the Regional Commissioner have the mandate to install an assistant chief. They submit further that the Petitioners have led no evidence to indicate that the Respondents' actions were in absolute bad faith, perpetuated by lies, greed and impunity as claimed.
24. It is finally submitted that the Petitioners have not proved their case as against the Respondents, and the court is urged to dismiss the petition in its entirety with costs to the Respondents. To buttress this position, the Respondents placed reliance on the findings in the case of *Ntusiet Anderson Kishaine & 2 others v Nelson Sairowa Kima & 3 others* [2017] eKLR, where the court dismissed a petition for failure on the part of the Petitioner to prove that any of their constitutional rights were infringed upon by the Respondents.

Analysis and Determination

25. Upon careful consideration of the petition herein, the Supplementary affidavit, the replying affidavit in response to petition, and the submission by both parties, the following issues crystalize for determination:
 - i. Whether the petition as filed meets the threshold of a Constitutional petition, and if so, whether the recruitment, selection and appointment of the 3rd Respondent contravened the *Constitution*; and
 - ii. What reliefs if any, are available to the Petitioners.

Whether the petition as filed meets the threshold of a Constitutional petition, and if so, whether the recruitment, selection and appointment of the 3rd Respondent contravened the *Constitution*

26. The petition herein, is premised on the alleged contravention of rights and fundamental freedoms under Articles 10, 22, 23, 27, 35, 41, 47, 159, 162 (2) (a), and 165 (3) (b) of the *Constitution*, 2010, in addition to various statutory provisions cited in the body of the petition, and the submissions therein.
27. The need to ascertain that a petition such as the one before court meets the threshold for a Constitutional petitions, is premised on the now settled principle that a Court will not determine an



issue under the Constitution, when a matter may properly be decided on another basis, also known as the doctrine of avoidance.

28. The issue herein, is whether the petition as drawn raises questions of interpretation and/or the application of the Constitution as to meet the required threshold.
29. The specific provisions of the Constitution said to have been violated are clearly detailed in the face of the petition. It is also not in dispute that the issues subject of the petition, as well as the relationship between the Petitioners and the Respondents, is not a private matter between two parties, but a public activity intrinsically connected to the operations of the Respondents. (See International Centre for Insect Physiology and Ecology (ICPE) v Nancy Minally [2018] eKLR).
30. In Trusted Society of Human Rights Alliance v Attorney General and 2 others [2012] eKLR, the Court had this to say on what constitutes a Constitutional petition:

“.....However, we are of the opinion that the proper test under the new Constitution is whether a petition as stated raises issues which are so insubstantial and so attenuated that a court of law properly directing itself of the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violations alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case (emphasis own).”

31. Going by the threshold set in the foregoing decision, my view is that the Petition herein, is concise and precise on the alleged violations of the Constitution by the Respondents, and properly constitutes a constitutional petition. I will thus proceed to determine the question of whether the appointment of the 3rd Respondent contravened the Constitution.
32. The Petitioners’ contention is that the 3rd Respondent neither applied nor interviewed for the position of assistant chief advertised by the 5th Respondent. It is further argued that the recruitment and appointment process was marred by political interference and myriad other malpractice, including prior sharing of interview questions through social media platforms.
33. The 1st, 3rd and 4th Respondent, in a replying affidavit sworn in opposition, deposed that there was a disparity in the name forwarded in the County Commissioner’s communication vide letter dated 27th November, 2023, where Joseph Okulo Ayoo was inadvertently referred to as Joseph Otieno Ayoo.
34. It is the Respondents’ assertion that vide a letter dated 8th December, 2023, addressed to the Regional Commissioner, the 5th Respondent noted the mix-up in the names, and proceeded to prepare a corrigendum indicating the correct name of the person recommended as Joseph Okulo Ayoo and not Joseph Otieno Ayoo.
35. It is indeed apparent from the exhibited list of persons listed for interview for the impugned position, that there was no applicant named Joseph Otieno Ayoo. It is not disputed that a Mr. Joseph Okulo Ayoo did apply and was interviewed for the position of assistant chief for Lower Kadongo Sub-location in Kisumu West Constituency.
36. The national values and principles of governance in Articles 10 and the values and principles of public service in 232 of the Constitution, enumerates mandatory requirements that must be observed in



recruitments and appointment to public offices, and which without doubt bound the Respondents herein in the recruitment and appointment subject of the instant petition.

37. Article 232((1)(g) accentuates fair competition and merit as the basis of appointment and promotion in the public service. The question then, is whether the 3rd Respondent was, firstly, appointed assistant chief for Lower Kadongo Sub-location in Kisumu West Constituency and secondly, whether the appointment was both competitive and meritorious.
38. From the pleadings filed herein, no applicant to the position of assistant chief now impugned, has laid claim to the name Joseph Otieno Ayoo, and as being the person appointed to the position.
39. Further, the minutes produced in evidence, indicates that one Joseph Okulo Ayoo did sit the interview and his name featured among the three names recommended for appointment. The court notes further that the identification card number for Joseph Okulo Ayoo (22226064) is the same number given to Joseph Otieno Ayoo in the letter recommending his appointment.
40. Additionally, the minutes referred to herein, further show that the said Joseph Okulo Ayoo presented his academic certificates which details his academic credentials as a Degree in Natural Resources Management, KCSE B, Good Conduct Certificate, Computer Certificate and Copy of his Identity card.
41. In light of the foregoing, this court is satisfied that indeed Joseph Okulo Ayoo was inadvertently referred to as Joseph Otieno Ayoo, and which error has since been rectified. It further follows that no appointment was made to the position of assistant chief Lower Kadongo, sub-location in Kisumu West Constituency in the name of Joseph Otieno Ayoo.
42. As correctly submitted by the Respondents, the Petitioners did not lead any evidence to prove political interference, canvassing or any other form of impropriety in the recruitment and appointment process, as to render the process unlawful and unconstitutional.
43. Finally, on the contempt motion, the Petitioners in their motion allege that the Respondents installed the 3rd Respondent to the office of assistant chief in contravention of the orders of the court.
44. In *Samuel M. N Mweru and other v National Land Commission & 2 others* [2020] eKLR, it was held that for a party to succeed in an application for contempt, the party must satisfy the court on following four elements:
 - i. That the terms of the order were clear, unambiguous and were binding on the defendant.
 - ii. The defendants had knowledge of or proper notice of the terms of order
 - iii. The defendant has acted in breach of the terms of the orders, and
 - iv. The defendants conduct was deliberate.
45. The Respondents did not at any point deny knowledge of the orders or that the orders were not clear. On the question of breach, other than the letter to the Principle Secretary of the 1st Respondent notifying him of the conservatory orders issued by this court, no evidence was led to prove that the person appointed was installed to the position during the pendency of the court orders.
46. The motion therefore fails and is for dismissal.
47. I further proceed to dismiss the Petitioners' petition dated 6th December, 2023, in its entirety.
48. This being a public interest litigation suit, I make no orders on costs.



49. Judgment of the Court.

**DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS
11TH DAY OF APRIL, 2024.**

CHRISTINE. N. BAARI

JUDGE

Appearance:

Mr. Ruto present for the Petitioners

Ms. Juma h/b for Ms. Essendi for 1st, 3rd, 4th and 5th Respondents

Mr. Koome h/b for Ms. Wangeci for the 2nd Respondent

Mr. Erwin Ongor - Court Assistant

