



**Omao v County Government of Kisii & 4 others (Petition
E023 of 2023) [2024] KEELRC 1398 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1398 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E023 OF 2023
CN BAARI, J
JUNE 13, 2024**

BETWEEN

VINCENT MARIITA OMAO PETITIONER

AND

COUNTY GOVERNMENT OF KISII 1ST RESPONDENT

GOVERNOR KISII COUNTY 2ND RESPONDENT

COUNTY SECRETARY, KISII COUNTY 3RD RESPONDENT

KISII COUNTY PUBLIC SERVICE BOARD 4TH RESPONDENT

**CECM, DEPARTMENT OF AGRICULTURE LIVESTOCK FISHERIES,
VETERINARY SERVICES IRRIGATION & CO-OPERATIVE
DEVELOPMENT 5TH RESPONDENT**

JUDGMENT

1. Before court is a petition dated 27th August, 2023, filed by one Vincent Mariita Omao (the Petitioner), brought in the public interest, and wherein, he seeks the following reliefs:
 - a. A declaration that the Respondents have jointly and severally violated his Fundamental Rights and Freedoms as protected under Articles 27,28,41,47 and 55 of the *Constitution*.
 - b. A declaration that the advertisement inviting applications without necessary budgetary approvals is unconstitutional and illegal and in violation of the *Public Finance Management Act, 2012*.
 - c. An order for cancellation of the advertisements as placed in the Daily Nation Newspaper of 22nd August, 2023, within 14 days of issue of an order from this Honourable Court.



- d. A declaration that the Respondents herein were obliged and/or enjoined to advertise all the vacancies and/or portfolios in the Kisii County Government and thereby carry out and/or conduct a transparent and/or accountable recruitment, in compliance and/or in accordance with Article 10(1), (c) of the Constitution 2010.
 - e. A declaration be issued to the effect that the 4th Respondent is bound to be managed and run in a manner that is in accordance with the Constitution, and in particular in line with the values and principles of accountability, good governance and transparency as espoused under Articles 10 of the Constitution.
 - f. A declaration be issued that the 4th Respondent is a body corporate, which has sole mandate to advertise, hire, recruit and appoint on behalf of the 1st Respondent.
 - g. An order of judicial review of certiorari be issued to remove into the honourable court for quashing the decision of the Respondents to advertise non-vacant and non-existent positions and as conveyed the advertisements by the Respondents and without due regard to the provisions of the County Government Act, No. 17 of 2012, Employment Act, 2007 and Article 10 of the Constitution, 2010.
 - h. An order declaring that the decision of the Respondents prompting to advertise non-vacant and non-existent positions was illegal and irregular and the same be brought into the court and be quashed pursuant to an order of certiorari.
 - i. An order of permanent injunction be issued restraining the Respondents either by themselves, agents, servants and/or employees from appointing, employing, recruiting and/or enlisting employees without complying with the due process of the law and in particular, the provisions of the County Government Act, 2012 and Article 10 (1) of the Constitution of Kenya, 2010.
 - j. A permanent injunction, restraining the Respondents either by themselves, agents, servants and/or employees, from admitting the subject employees to the Payroll of the 1st Respondent and/or making any payments to and/or in favour of the said employees, either on account of remuneration, allowances and/or salaries, without the necessary budgetary approval of the Kisii County Government, whatsoever and/or howsoever.
 - k. A permanent injunction restraining the Respondents either by themselves, agents, servants and/or employees, from employing, recruiting and/or enlisting employees without complying with the due process of the law and in particular, the provisions of Article 10(1) of the Constitution, 2010.
 - l. This Honourable Court do order that the costs of this Petition be borne by the Respondents.
 - m. Any other or further orders, writs and directions this court considers appropriate and just to grant for the purpose of the enforcement of the Petitioner's Fundamental Rights and Freedoms.
2. The Petition is premised on the grounds that:
- i. Vide an advertisement published on the Daily Nation Newspaper of 22nd August, 2023, the 1st Respondent through the office of the 5th Respondent declared several posts in various departments vacant and invited applicants to submit applications by the 29th of August, 2023.
 - ii. The 5th Respondent has advertised to fill 662 non-existent posts which will have salaries amounting to Ksh. 50,000,000/= per month.



- iii. The County Government of Kisii's Annual Development Plans, County Budget Review Outlook Paper, Budget Estimates, Budget Approval and Appropriation documents including the Approved Budget 2023/2024 do not support recruitment of positions contested; notwithstanding failure of proof depository of annual recruitment plans with the County Public Service Board.
- iv. The 5th Respondent has advertised non-vacant posts and created new positions not contemplated by the [County Governments Act](#), 2012.
- v. The 5th Respondent is performing the functions of the 4th Respondent. Recruitment is a sole mandate of the County Public Service Board.
- vi. The current wage bill is 45% and if the County Government proceeds with the impugned recruitment, there will be no money for development as all the revenue, grants and money from the National Treasury will be spent on recurrent expenditure.
- vii. No employment and/or recruitment exercise can be carried out and/or undertaken by and/or on behalf of the 4th Respondent, without a decision having been made to that effect. That in fact such decision can only arise and/or ensue from respective Chief Officers who are authorized officers, in accordance with the provisions of the [County Government Act](#), No. 17 of 2012.
- viii. The said authorized officers have not deposited Annual Recruitment Plans with the County Public Service Board to cause the vacancies.
- ix. There is no budgetary provision for the advertised non-vacant positions as per the approved Budget for the year 2023/2024.
- x. Advertising such positions most of which are non-vacant and not in the organizational structure is not only discriminatory, mischievous and informed by ulterior motives, but also meant to "create vacancies" for political expediency to award cronies after the electioneering period.
- xi. The positions as advertised are not based on any comprehensive plans, need analysis, strategic plans and annual recruitment plans or public participation.
- xii. If allowed to proceed the recruitment, will amount to double spending and akin to dismissal of poorly remunerated staff in the county payroll, consequently violating the legitimate expectation of the workers.
- xiii. The advertised positions do not provide equal opportunity as the requirements are skewed to favour a targeted group of applicants.
- xiv. Protection of public funds is the responsibility of every state organ and/or persons and hence the Petitioner has a Constitutional duty to superintend compliance with the [Constitution](#), 2010. That Article 207 of the [Constitution](#), 2010, provides the manner in which Public funds may be expended.
- xv. Owing to the foregoing and given the magnitude of the issues raised herein, least of which is the amount to be expended on a monthly basis, on account of salary and the Constitutional values that must be vindicated, this is a fit and proper case to grant the conservatory orders sought.
- xvi. The advertisement is a demonstration of failure to plan and contain the wage bill which will continue being an issue affecting development amounting to a gross violation of the



Constitution, Public Finance Management Act 2012 and other enabling legislation on part of the County Public Service Board.

- xvii. The actions and/or omissions of the Respondents complained of, amount to discrimination, unfair administrative action, unfair hearing and unfair labour practices, constituting a violation and/or infringement of the Petitioner's fundamental rights under the provisions of Article 2(2), 27(1), 47(1), 50(1) & 236 of the Constitution, 2010.
- xviii. The Respondents are bound to trample upon the rights of thousands of residents of Kisii County and put the Constitution in discord.
- xix. This Honourable Court has the Jurisdiction to grant the orders sought herein as they border on the interpretation and applicability of the various provisions of the Constitution of Kenya, 2010 and the enforcement and protection of the Fundamental Rights of the Petitioner.
- xx. The actions of the Respondents' herein, are manifestly unconstitutional and unlawful, are prejudicial to the basic and fundamental human rights of the Petitioner, and ought to be remedied in the manner sought in this Petition.

The Petitioner's Case

3. The Petitioner states that he is a Kenyan with a zeal for Constitutionalism, the rule of law and good governance.
4. He avers that the 2nd Respondent in conjunction with the 3rd and 5th Respondents irregularly posted an advert for recruitment of non-vacant and non-existent posts in the Daily Nation of 22/8/2023.
5. He affirms that in the absence of an active County Public Service Board as is the case in Kisii County, no employment or recruitment can be lawfully undertaken.
6. He reiterates that Kisii County does not have an active County Public Service Board by dint of the Court of Appeal order in Kisumu Judicial Review *No. E013 of 2023*.
7. Additionally, it is his contention that the 5th Respondent or authorized officers had not deposited an annual recruitment plan with the 4th Respondent.
8. The Petitioner's further case is that there is no budgetary provision for the advertised positions in the approved budget for 2023/2024.
9. The Petitioner avows that the advert is bereft of the 4th Respondent's participation was discriminatory, and was done for the purposes of political expediency and awarding cronies.
10. It is the Petitioner's case that the positions advertised would significantly increase the wage bill to unmanageable levels, making it imperative for the court to step in to protect public funds.

The Respondents' Case

11. The 1st -5th Respondents opposed the petition vide a replying affidavit sworn on 15th November 2023 by Samuel Oduor Okumu.
12. He depones that as the the County Project Coordinator for the Agricultural Value Chain Development Kisii County, he is conversant with the issues raised in the petition.
13. He states that the advert alluded to by the Petitioner was put out jointly by the National Government, the 1st Respondent and the National Agricultural Value Chain Development Project (NAVCDP). As such, it was not a project initiated by the Kisii County government.



14. He depones that to the best of his knowledge, it is the national government which provided resources to run the project. He stresses that the engagement of the agri-prenuers and supervisors was for a short-term period that has since lapsed.
15. The Respondents' further case as gleaned from the replying affidavit is that the County Public Service Board has no role to play in a National Government Project. Additionally, the Respondents contend that being a National Project the County wage bill was not under threat.
16. Moreover, the Respondents' assertions are that the powers of the County Public Service Board cannot be invoked as the project is a creature of the National Government.
17. For these reasons, the Respondents assert that the Petitioner's case is a non-starter as some of the reliefs sought have been overtaken by events, and no Constitutional provisions have been violated.

The Petitioner's Submissions

18. The Petitioner submits that the basic principles of the Constitution are meant to be adhered to by all including state organs at both levels of Government. He submits that the 5th Respondent has usurped the role of the 4th Respondent, thus contravening constitutional dictates.
19. The Petitioner's further submits that the advert was made without a budget contrary to Article 10 of the Constitution. Moreover, the Petitioner submits that the positions sought to be filled had not been classified as 'very critical staff'.
20. It is the Petitioner's submission that even if the positions sought to be filled were critical, they could not be done in the face of apparent illegalities. He cites the case of Biwott v County Public Service Board Baringo County & another (Constitutional Petition E10 of 2022)[2022] KEELRC 1360 (KLR) where the court despite noting that the positions to be filled by the 2nd Respondent were very necessary, constitutional and statutory safeguards to protect public finance should not be contravened.
21. In further support of prudent use of public finances the Petitioner cites Speaker Nakuru County Assembly & 46 Others v Commission on Revenue Allocation & 3 others [2015] eKLR where the court urged practical use of public resources for progressive purposes. The court stated that the Respondent's action of having a bloated workforce violated public finance principles in Chapter 12 of the Constitution and section 162 of the Public Finance Management Act.
22. In concluding his submissions, the Petitioner asserts locus standi to seek redress in instances of gross violation of the Constitution, based on the case of David Ngige Tharau & 128 Others v Principal Secretary Ministry of Lands Housing and Urban Development & 2 others [2016] eKLR where the court stated thus:-

“In my view, where it is apparent to the court that the bill of rights has been or is threatened with contravention to avoid to enforce the bill of rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the court can glean from the pleadings the substance of what is complained of would amount to this court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the latter ought to prevail over the former.”



The Respondent's Submissions

23. The Respondents submit that the petition does not meet the threshold of precision set in the case of *Anarita Karimi v Republic*.1979(eKLR). They contend that no material has been availed connecting them to the said advertisement and non-existent jobs. Additionally, the Respondents submit that the Petitioner has not demonstrated how his rights have been violated.
24. It is submitted for the Respondents that the Petition does not contain any facts, figures or documentation in support of non-adherence with Article 10 of the *Constitution*. They cite the case of *Philip Njoroge v Liberty Africa Technologies Limited & Another* (2021) eKLR and *Kiambu County Tenants Welfare Association v Attorney General & another* (2017)eKLR where the courts restated the need for precision in constitutional petitions as enunciated in the *Anarita Karimi case (supra)*.
25. The Respondents further submit that no evidence has been placed before court to controvert their assertions that the recruitment was a creature of the National Government. Moreover, it is their contention that their proclamations that: the 4th Respondent did not play any role in the process, no funds were allocated by the County Government, all resources emanated from the national government and no provision of the County budget was breached have not been controverted.
26. The Respondents urges the court to find that the petition falls short of the required constitutional threshold and should thus be dismissed.

Analysis and Determination

27. The issues that fall for determination are:
 - i. Whether the advertisement of the 22/8/2023 Contravened Constitutional provisions.
 - ii. Whether the Petitioner is entitled to the reliefs sought.

Whether the advertisement of the 22nd August, 2023 Contravened Constitutional provisions.

28. The Petitioner contends that the advertisement was geared at filling 662 non-existent posts and was informed by political expediency and rewarding of cronies. He further argues that there was no budget to support the recruitment and that in sending out the advertisement, the 5th Respondent circumvented the law by usurping the role of the 4th Respondent (County Public Service Board), hence a violation of Articles 27,28,41,47 and 55 of the *Constitution*.
29. On their part, the Respondents aver that the project was driven by the National Government hence the issue of County budget or wage bill being unsustainable does not arise. It is their assertion that the petition has been overtaken by events as the Agripreneurs and supervisors have already been engaged and have since discharged.
30. On whether the purpose for which the advertisement was floated was for political cronyism, no evidence has been led to support this assertion and the same is in my view, mere conjecture.
31. For starters, the Court notes that the advertised positions were in respect of a Project run jointly by the County Government of Kisii and the World Bank as shown by the budget produced in evidence by the Petitioner as well as the advertisement subject of this petition.
32. The Respondents' argument is that the 4th Respondent (CPSB) had no role in the recruitment premised on the fact that the persons recruited were to serve in a Project/Programme run externally and that it was not directly funded by the county government.



33. Section 59(1) of the *County Government Act* details the functions of the County Public Service Board as follows: -

“The functions of the County Public Service Board shall be, on behalf of the county government, to—

- a. establish and abolish offices in the county public service;
 - a. appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;
 - b. exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part;
 - c. prepare regular reports for submission to the county assembly on the execution of the functions of the Board;
 - d. promote in the county public service the values and principles referred to in Articles 10 and 232;
 - e. evaluate and report to the county assembly on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the county public service;
 - f. facilitate the development of coherent, integrated human resource planning and budgeting for personnel emoluments in counties;
 - g. advise the county government on human resource management and development;
 - h. advise county government on implementation and monitoring of the national performance management system in counties;

34. Section 63 goes on to spell out how the CPSB exercises its power to make appointments as follows: -

“Except as provided for in the *Constitution* or legislation, the County Public Service Board has the power to make appointments including promotions in respect of offices in the county public service....”

35. By the foregoing provisions, it is clear that the central mandate of the CPSB is to appoint persons to hold or act in offices of the county public service. The recruitments subject of this petition related to appointments to positions in a donor Project/Programme which begs the question of whether these are offices in the county public service, and whether the CPSB had a role in the recruitment to these positions.

36. The straight answer in my view, is that the CPSB has no role to play in such recruitments for the simple reason that the appointments are outside the county public service and last only for the term of the particular project.

37. It is also true that the Petitioner has not controverted the assertions by the Respondents that the Project subject of the impugned recruitment was a collaboration between the National Government,



the County and a donor agency, and further that no money was used by the County government in respect of the recruitments, hence the need for budgetary provision in the 1st Respondent's approved budget does not arise.

38. On the issue concerning *status quo* order issued by the Court of Appeal in Kisumu Judicial Review No. E013 of 2023, a glean at the orders indicates that the orders expressly stayed the replacement of Petitioners therein and have no bearing on the instant petition. It is a completely different matter whose orders do not impact the decision of this court on the instant petition.
39. On the Constitutional provisions allegedly contravened, it is now settled that a Petitioner should clearly state with precision how their rights have been infringed as was held in *Anarita Karimi Njeru v Republic* (No1)-[1979] KLR 154 where the court stated: -

“... if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

40. In the case of *Christian Juma Wabwire v Attorney General* [2019] eKLR, the court relied on the decision in *Lt Col Peter Ngari Kagume and 7 others v AG*, Constitutional Application No 128 of 2006 where it was held that: -

“It is incumbent upon the petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of violations could be true, but the court is enjoined by law to go by the evidence on record.....”

41. The petition herein, bears no evidentiary basis to sustain the alleged infringement of the constitutional provisions cited. Save for the advert and the approved budget, nothing much has been offered to buttress the Petitioner's assertions. The petition is therefore unmerited.
42. This court relies on the case of *Christian Juma Wabwire v Attorney General* [2019] eKLR (*supra*) for the holding that courts of law are deaf to speculations and irregularities as it must always base its decision on evidence.
43. I therefore find and hold that the Petitioner has failed to discharge the burden of proof to the required standard, and the petition is doomed to fail, and is hereby dismissed.
44. This being a public interest litigation suit, I make no orders on costs.
45. It is ordered.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 13TH DAY OF JUNE, 2024.

C. N. BAARI

JUDGE

Appearance:

Mr. Omandi h/b for Mr. Mainga for the Petitioner

Mr. Kaburi present for the Respondents

Anjeline Wanjofu - C/A

