



**Mohamud v Independent Electoral and Boundaries Commission & 2 others  
(Petition 35 of 2022) [2023] KEELRC 1338 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1338 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION 35 OF 2022**

**B ONGAYA, J**

**MAY 25, 2023**

**IN THE MATTER OF THE ENFORCEMENT OF  
ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24,  
27,28,29,38,40,47,48,50 OF THE CONSTITUTION OF  
KENYA, 2010**

**IN THE MATTER OF VIOLATION OF THE RIGHTS AND  
FREEDOMS IN THE BILL OF RIGHTS  
IN THE MATTER OF RULES OF NATURAL JUSTICE  
AND THE DOCTRINE OF LEGITIMATE EXPECTATION**

**BETWEEN**

**MARIAM ABDI MOHAMUD ..... PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT**

**WAJIR COUNTY ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT**

**WAJIR COUNTY ASSEMBLY SERVICE BOARD ..... 3<sup>RD</sup> RESPONDENT**

*(Formerly High Court Petition No. E002 OF 2021 at Garissa)*

**JUDGMENT**

1. The petitioner is Mariam Abdi Mohamud. She filed the petition on February 10, 2021 through M/s Okubasu, Munene & Kazungu LLP Advocates. The petitioner prayed for the following reliefs:



1. A declaration that the petitioner's legitimate expectation of being entitled to all benefits accorded to nominated members of the Wajir County Assembly gazetted in the gender top up list published on the August 28, 2017 was violated.
  2. A declaration that the constitutional rights of the petitioner set out under Articles 27(1) & (2), 28, 29(d), 40(3), 41 (1), 47(1) of the Constitution as read together with section 4(1) of the Fair Administrative Action Act has been violated by the Respondents.
  3. General Damages for violation of the Petitioner's Constitutional Rights under Articles 27(1) &(2), 28, 29(d), 40(3), 41 (1), 47(1) of the Constitution as read together with section 4(1) of the Fair Administrative Action Act.
  4. A declaration that the petitioner is entitled to emoluments and all such other benefits that would have accrued to her if her name was not unlawfully omitted in the Gazette Notice of August 28, 2017.
  5. Costs of the petition.
2. The undisputed facts leading to the petition and relied upon by the petitioner are as follows:
- a. The Party of National Unity (PNU) being a registered political party nominated and submitted the name of the petitioner prior to the General Elections of August 8, 2017 in the gender top-up list, among others, to the IEBC as required under Article 90(2) (a) of the Constitution.
  - b. The 1<sup>st</sup> respondent (IEBC) published a list of the successful candidates vide Gazette Notice No 8380 Volume CXIX-No 124 on August 28, 2017 and unlawfully omitted the petitioner's name as a validly nominated member of the County Assembly of Wajir despite the fact that both PNU and the petitioner had met all the prerequisite conditions.
  - c. The petitioner challenged the said Gazette Notice by IEBC in *Mariam Abdi Mohamed Versus IEBC and Another* [2017]eKLR and Hon Wanjala by the judgment delivered on December 14, 2017 declared the Gazette Notice as null and void and ordered that the IBC to Gazette the petitioner as a nominated MCA.
  - d. An appeal was preferred to the High Court against judgment and decree by Hon. Wanjala but the same was settled out of Court leading to the gazettelement of the petitioner as a nominated member of the county assembly (MCA) vide Gazette Notice No 6628 of July 6, 2018. it was to the effect that the petitioner's name be included as an addition to the names that were initially published on August 28, 2017 under Gazette Notice No 8380 CXIX No 124 of August 28, 2017.
  - e. The petitioner filed the petition in the High Court at Garissa and subsequently in a ruling delivered on February 10, 2022 the Court (Ali Aroni J) found that the Employment and Labour Relations Court of Kenya was clothed with the jurisdiction to determine the petition and transferred the matter for hearing and determination accordingly.
3. The petitioner has urged as follows:
- a. By failing to publish the name of the petitioner in the Gazette notice of August 28, 2017 for no lawful reason the 1<sup>st</sup> respondent acted in contravention of Article 10 (1) and (2) of the Constitution which required the IEBC to act in in a manner that upholds National Values



and Principles including rule of law, democracy, human dignity, equity, social justice, equality, human rights and non-discrimination.

- b. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents have violated Article 10(1) by failing to pay the petitioner the accruing emoluments after the unlawful failure of her gazettement on August 28, 2017. The values and principles violated include rule of law, democracy, human dignity, equity, social justice, equality, human rights and non-discrimination.
  - c. The failure of her gazettement on August 28, 2017 amounted to violation of Article 27(1) and (2) of the Constitution requiring that every person be subjected to equal protection and equal benefit of the law and that equality includes the full and equal enjoyment of all rights.
  - d. By omitting to gazette the petitioner on August 28, 2017 and failing to pay the accruing emoluments the respondents have breached the petitioner's right to human dignity contrary to Article 28 of the Constitution.
  - e. By omitting to gazette the petitioner on August 28, 2017 and failing to pay the accruing emoluments the respondents have subjected the petitioner to psychological torture contrary to the provisions of Article 29(d) of the Constitution.
  - f. The failure to gazette the petitioner on August 28, 2017 violated the petitioner's political right of holding office if so elected contrary to provisions of Article 38(3) (c) of the Constitution.
  - g. By arbitrarily withholding the accrued emoluments the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents have deprived the petitioner of her property per Article 40(3) of the Constitution. Further, by so doing the respondents have breached the petitioner's right to fair labour practices contrary to the provisions of Article 41 (1) of the Constitution. The failure to pay the accrued emoluments further amounted to subjecting that petitioner to an unfair and unlawful administrative action contrary to Article 47(1) of the Constitution as read with section 4(1) of the Fair Administrative Action Act.
4. The 1<sup>st</sup> respondent opposed the application by filing the replying affidavit of Chrispine Owiye the Director of Legal Services for the 1<sup>st</sup> respondent sworn on December 14, 2022 and drawn and filed by Hassan Mutembei & Company Advocates. It was urged for the 1<sup>st</sup> respondent as follows:
- a. The facts leading to the petition as pleaded for the petitioner are admitted.
  - b. There is no employer-employee relationship between the 1<sup>st</sup> respondent and the petitioner and violations of failure to receive the accrued emoluments cannot be validly moved against the 1<sup>st</sup> respondent. The alleged legitimate expectation in that regard is denied.
  - c. Under section 18 of the Employment Act, wages and salaries are deemed to be due at the end of a month or part thereof for employees working for month or more. Period.
  - d. The 1<sup>st</sup> respondent discharged its constitutional role by gazetting the petitioner on July 6, 2018 by Gazette Notice No 6628.
  - e. The 1<sup>st</sup> respondent is improperly enjoined as a respondent.
  - f. The gazettement was pursuant to a consent order whose terms were not that the accrued salaries be paid.
  - g. The 1<sup>st</sup> respondent is a stranger to the allegations and reliefs sought.
  - h. The petition be dismissed with costs.



5. It appears that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not appear, file replying affidavits or final submissions.
6. The Court has considered the material on record and the submissions filed for the petitioner and the 1<sup>st</sup> respondent. The Court returns as follows.
7. To answer the 1<sup>st</sup> issue, the Court finds that the petitioner's allegations as urged against the 1<sup>st</sup> respondent are res judicata as they ought to have been urged in the earlier proceedings *Mariam Abdi Mohamed Versus IEBC and Another* [2017]eKLR and the petitioner has not urged a justification why, in that previous case, the reliefs sought and flowing from the failure of the 1<sup>st</sup> respondent to gazette her were not pursued and urged. The allegations as made against the 1<sup>st</sup> respondent for failure to initially gazette the petitioner will collapse.
8. To answer the 2<sup>nd</sup> issue, the Court finds that the petitioner has not established justifiable basis or ground for the 1<sup>st</sup> respondent to pay her the accrued emoluments after the gazette of July 6, 2018. It is not urged or alleged for the petitioner that if the initial gazette of August 28, 2017 had included her name then her emoluments as nominated MCA would have been paid by the 1<sup>st</sup> respondent effective that date.
9. To answer the 3<sup>rd</sup> issue, the petitioner has made a blanket prayer against the respondents for payment of accrued and unpaid emoluments without showing the justification to do so. The petitioner has exhibited the letter dated September 25, 2019 addressed to the Speaker of the 2<sup>nd</sup> respondent being also the chairperson of the 3<sup>rd</sup> respondent demanding the withheld emoluments. The petitioner received no response. The Court finds that she is entitled to a declaration that the 2<sup>nd</sup> and 3<sup>rd</sup> respondent pay her accrued emoluments from August 28, 2017 to July 6, 2018. That should, in the Court's opinion, be the adequate remedy for the violation of the right to fair labour practices and fair remuneration because in money terms, that was the measure of her true loss.
10. To answer the 4<sup>th</sup> issue the Court finds that the petitioner has not shown how the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were involved in the omission of her name in the initial gazette notice of August 28, 2017. The Court therefore returns that she has failed to show the violations of the Bill of Rights as alleged and as relating to that omission as against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. As already found by the Court, allegations and prayers against the 1<sup>st</sup> respondent in that regard ought to have been urged in the previous dispute unless a bar in that regard was established to have existed but which bar, is not shown by the petitioner, to have existed at all.
11. The Court has considered all the circumstances of the case including that the petitioner had really been unfairly excluded in the initial gazette. That issue of unlawful omission had been resolved in the earlier proceedings between the parties. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents have not been shown to have occasioned the omission in the petitioner's initial exclusion in the gazetted nominated MCAs. In that consideration each party to bear own costs of the petition.
12. In conclusion the petition is hereby determined with orders:
  - a. The declaration hereby issued that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are jointly or severally liable to pay the petitioner her accrued and unpaid monthly emoluments and such other benefits that are quantifiable as due to her from August 28, 2017 to July 6, 2018.
  - b. Each party to bear own costs of the petition.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 25<sup>TH</sup> MAY, 2023.**



**BYRAM ONGAYA  
PRINCIPAL JUDGE**

