



**Ouru v County Assembly of Nyamira & 3 others (Petition
E005 of 2023) [2023] KEELRC 1008 (KLR) (3 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1008 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E005 OF 2023**

S RADIDO, J

MAY 3, 2023

BETWEEN

JAMES OROKO OURU PETITIONER

AND

COUNTY ASSEMBLY OF NYAMIRA 1ST RESPONDENT

DR JACK MAGARA 2ND RESPONDENT

HONOURABLE GOVERNOR, NYAMIRA COUNTY 3RD RESPONDENT

COUNTY PUBLIC SERVICE BOARD 4TH RESPONDENT

JUDGMENT

1. James Oroko Ouru (the Petitioner) sued the County Assembly of Nyamira, Dr Jack Magara, the Governor, Nyamira and the County Public Service Board (the Respondents) on 7 February 2023, alleging that the appointment of Dr Jack Magara (the 2nd Respondent) as the County Secretary was unlawful because he was not qualified to hold the position.
2. The Petitioner prayed for orders:
 - (a) A declaration that the 2nd Respondent, Dr Jack Magara is not qualified for appointment/nomination to the position of the County Secretary of Nyamira County or any other public or state office in Kenya.
 - (b) An order of certiorari quashing the decision of the 3rd Respondent appointing the 2nd Respondent Dr Jack Magara as the County Secretary, Nyamira County.
 - (c) An order of prohibition prohibiting the 1st Respondent from approving the appointment of the 2nd Respondent, Dr Jack Magara as the County Secretary, Nyamira County.



- (d) An order of mandamus compelling the 1st and 3rd Respondents and other stakeholders to do a fresh sourcing, appointment and approval of a qualified County Secretary under section 44 of the [County Governments Act](#) within a time to be stipulated by this Honourable Court.
 - (e) That the costs of this Petition be provided for.
 - (f) Any other relief that the Honourable Court deems fit and just.
3. Filed together with the Petition was a Motion under a certificate of urgency.
 4. When the Motion and Petition were placed before the Court on 8 February 2023, it directed that the Respondents be served.
 5. The Chair of the County Public Service Board (the Board) and the 2nd Respondent filed replying affidavits in opposition to the Petition on 17 February 2023.
 6. The Court gave further directions on 20 February 2023 and 2 March 2023.
 7. As a consequence, the Respondents filed their submissions on 4 April 2023. The Petitioner's submissions were not on record by the agreed timeline.

Petitioner's case

8. The Petitioner's case was that the 2nd Respondent was unqualified to hold the office of the County Secretary because during his tenure as Director, Health he was involved in overseeing the poor construction of Nyamusi Level 4 Hospital which collapsed before completion leading to wastage of public funds; that the 2nd Respondent did not deserve promotion to Chief Officer due to wanting performance; that the 2nd Respondent continued to earn allowances which he was not entitled to upon promotion; that the Board had irregularly approved the continued payment of the allowances to the 2nd Respondent contrary to section 59 of the [County Governments Act](#); that the 2nd Respondent was in abuse of office by continuing to enjoy allowances for an office that he no longer held; that the 2nd Respondent irregularly superintended the recruitment of 34 health workers and that the appointment of the 2nd Respondent to the office of County Secretary was against the national values and unpatriotic.

The Respondents' take

9. The Respondents opposed the Petition on the grounds that the construction of the Nyamusi Level 4 hospital was overseen by a Contract Implementation Committee which even noted faults and had the contractor redo the works; the hospital was a multi-year contract and was nearing completion; that the recruitment of 34 health workers was a function of the Board; that the [County Governments Act](#) as read with the [Public Appointments \(County Assemblies Approval\) Act](#) had put in place avenues to raise concerns about suitability to hold public office within the county public service and therefore the objections raise by the Petitioner were premature and incompetent; that the allowances paid to the 2nd Respondent after promotion were codified in a collective bargaining agreement between the Kenya Medical Practitioners, Pharmacists and Dentists Union and County Government of Nyamira and were therefore legal.

Determination

10. The Court has considered the Motion, Petition, affidavits and submissions.



Jurisdiction

11. The Respondents objected to the first instance jurisdiction of the Court because of the alternative dispute resolution mechanisms set out in section 87(2) of the [Public Service Commission Act](#) as read with section 77 of the [County Governments Act](#).
12. The office of the County Secretary is established under section 44 of the [County Governments Act](#). The section also outlines the qualifications for the office and the recruitment/appointment process. The removal process is also provided for.
13. Part of the process includes approval by the County Assembly.
14. The approval/appointment process is also underpinned by the [Public Appointments \(County Assemblies Approval\) Act](#) which has set out elaborate provisions on the recruitment and appointment (see sections 4, 5, 6, 7, 8, 9, 10, 11 and 12).
15. The legal framework envisages that any objections or concerns on the qualification and suitability of a nominee would be placed before the County Assembly at the first instance.
16. The Petitioner had the opportunity to raise the concerns now placed before the Court with the County Assembly during the approval process, but it seems he snubbed that opportunity.
17. Having snubbed the opportunity to raise the concerns before the County Assembly, the Petitioner still had the door contemplated by section 77(2)(a), (d) and (e) of the [County Governments Act](#) as read with section 87(2) of the [Public Service Commission Act](#) to appeal to the Public Service Commission.
18. Instead of knocking on that door, he moved the Court.
19. Regrettably, the Court's jurisdiction is deferred.
20. The Petition was, therefore, premature as its effect would have led the Court to usurp the function of other statutorily ordained legal organs with the mandate to consider the eligibility and qualifications, approve appointments or consider removals from and within the county public service.

Merits of the Petition

21. On the assumption that the Court is wrong on its conclusions on jurisdiction, it will address the merits of the Petition.
22. The Petitioner did not place before the Court evidence that the 2nd Respondent was in charge of the construction of the Nyamusi Level 4 hospital or that the construction was poorly done.
23. The photographic evidence placed before the Court without any expert report or evidence does not meet the threshold to find the 2nd Respondent was culpable.
24. With respect to allowances, the Respondents did not deny that the 2nd Respondent continued to enjoy certain allowances upon promotion from Director to Chief Officer.
25. The Respondents justified the payment of the allowances on the basis of a collective bargaining agreement between the Kenya Medical Practitioners, Pharmacists & Dentists Union and the County Government of Nyamira.
26. The Court has looked at the agreement and it provides for the allowances. Since the Petitioner did not suggest that the 2nd Respondent was not a member of the Union, the Court finds that he was eligible to the allowances, unless otherwise varied contractually or by law.



27. On the question of the unlawful recruitment of 34 health workers, the Petitioner did not place any evidence before the Court that the Respondents were involved in the irregular or unlawful recruitment of 34 health workers.
28. The Court, would have equally found the Petition without merit.

Conclusion and Orders

29. Flowing from the above, the Court declines jurisdiction and strikes out the Petition.
30. Costs are awarded to the Respondents.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 3RD DAY OF MAY 2023.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Petitioner G. Imbaya Advocates

For Respondents County Attorney, Nyamira

Court Assistant Chrispo Aura

