



**Kassim v Governor, County Government of Garissa; County
Service Public Board (Interested Party) (Constitutional Petition
E002 of 2022) [2023] KEELRC 1782 (KLR) (14 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1782 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS AT GARISSA
CONSTITUTIONAL PETITION E002 OF 2022**

SC RUTTO, J

JULY 14, 2023

**IN THE MATTER OF: CONTRAVENTION OF ARTICLES 10, 19(1) AND (2) 20(1), 23(1),
27, 47(1), 50(1), 73(1) AND (2) AND 235 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: DIRECTIONS ISSUED BY THE GOVERNOR, COUNTY
GOVERNMENT OF GARISSA ON THE APPOINTMENT OF A TASK FORCE
ON COUNTY STAFF AUDIT BY GARISSA COUNTY GOVERNMENT VIDE
KENYA GAZETTE NOTICE NO.13821 DATED 2ND NOVEMBER, 2022**

BETWEEN

HALIMA MOHAMED KASSIM PETITIONER

AND

THE GOVERNOR, COUNTY GOVERNMENT OF GARISSA RESPONDENT

AND

THE COUNTY SERVICE PUBLIC BOARD INTERESTED PARTY

JUDGMENT

1. Pursuant to Gazette Notice No. 13821, the Respondent, appointed a seven member Special Taskforce on County Staff Audit, whose terms of reference were as follows: -
 - i. to hear any concerns that may be raised by staff who may have been affected by the recommendations of the recent human resource audit;



- ii. compile and submit a comprehensive report with clear recommendations of actions to be taken by the County Government relating to issues that may arise from point one above.
2. Following the appointment of the Taskforce, the Respondent issued further communication to members of the general public and officers notifying them inter alia, of the establishment of the Taskforce and its sittings.
3. The Petitioner who describes herself as a resident and registered voter in Garissa County, was aggrieved by the appointment of the aforementioned Taskforce hence filed the instant Petition through which she seeks the following orders: -
 - i. A declaration be and is hereby issued that the directive issued by the Respondent contained in Kenya gazette Notice No. 13821 dated 8th November, 2022 purporting to set up a Taskforce on county staff audit unconstitutional and null and void ab initio;
 - ii. Costs of this Petition to be borne by the Respondents; and
 - iii. Any other orders that this Honourable Court may deem fit to grant in the circumstances.

The Petitioner's case

4. The Petitioner avers that according to the county communications office, the Garissa County Human Resource Audit was conducted by the State Department for Public Service. That todate, the alleged audit report that informs the mandate of the Taskforce on County Staff Audit has not been released to the public and it is her reasonable belief that the report does not exist and is the machinations of the Respondent to abuse his office and discriminate against employees appointed by the County Government Garissa from 2017 to 2022. She further states that in the event of its existence, she has reason to believe that the alleged "Comprehensive HR Audit" alluded to was limited to staff hired between 2017 and 2022.
5. According to the Petitioner, the alleged "Comprehensive HR Audit", if any, was nothing more than a witch-hunt to purge the ranks of the Garissa County Public Service employees appointed when the Respondent was not in office and is therefore discriminatory and a violation of their right to work due to who was in office when they were employed.
6. The Petitioner further avers that the mandate to regulate the engagement of persons on contract, volunteer and casual workers, staff of joint ventures and attachment of interns in its public bodies and offices is vested in the County Public Service Board. That further, the mandate to advise the county government on human resource management and development is vested in the County Public Service Board and any purported performance of this function by any other authority constitutes a violation of the law and an abuse of office.
7. It is the Petitioner's case that if any process or decision concerning the County Public Service may have occurred in an irregular or fraudulent manner, then the County Public Service Board shall investigate the matter and make an appropriate decision including taking any corrective action including disciplinary action in accordance with Section 75 of the *County Governments Act*.
8. According to the Petitioner, the Taskforce does not enjoy the benefits of being an independent authority like the County Public Service Board and being largely comprised of former members of the Garissa County Public Service Board hired by the Respondent during his first term and also



campaigning for him in the August 2022 election, is pretentious exercise timely constituted to rubber stamp the Governor's decision to remove almost all staff employed between 2017 and 2022.

9. She further contends that the existence of the Taskforce and the Report it purportedly seeks to implement considering the functions of the County Public Service Board, is nullity ab initio and should not be allowed to stand.
10. She goes on to state that the Ethics and Anti-Corruption Commission had noted that some Governors have expressed unwillingness to work with certain members of staff who had been hired by the previous regimes and in some instances, such staff are being threatened with sacking, dismissals, or subjected to unwarranted, illegal, or unprocedural disciplinary procedures aimed at forcing their exit from office.
11. She maintains that all administrative processes relating to staff must be undertaken by and in consultation with the relevant agencies including County Public Service Board, which is mandated to recruit, deploy and discipline all staff in the County Government.

The Respondent's Case

12. The Respondent opposed the Petition through the Replying Affidavit sworn by Mr. Nathif Jama Adam on 24th November, 2022. He avers that the Petitioner has no mandate or authority to purport to bring and file this Petition on behalf of the affected staff of Garissa County, who currently stand unaffected, and are fully employed and earning their salaries. That she is neither an employee of the Interested Party herein nor the County Government of Garissa and stands unaffected by any actions of the Respondent.
13. Mr. Nathif further denies usurping any functions and/or powers of the Interested Party herein within the meaning of Section 59 of the *County Governments Act*. He further avers that the allegation by the Petitioner that he is intent on discriminating against employees of the County Government of Garissa, employed between 2017 and 2022 is untrue and needs to be substantiated.
14. It is the Respondent's case that the Comprehensive Audit was a noble exercise aimed at stopping pilferage and saving and redirecting County resources to better use where possible and necessary as opposed to the ill-advised position of the Petitioner that the same was an exercise meant to purge out employees employed by the previous administration. That it is an absurdity for the Petitioner to allege that the appointment of the Taskforce and its role thereof, is for purposes of settling political scores, despite there being a political and democratic system being that of secret ballot.
15. According to Mr. Nathif, the audit seeks to serve a noble purpose, namely: -
 - i. To enhance effectiveness of the County Government workforce.
 - ii. To verify compliance of appointments and promotions with the laid down public service laws and procedures.
 - iii. To conduct harmonization of job groups and rationalization of staff.
 - iv. To conduct verification of County human resource output and effectiveness of the workforce.
16. He further avers that a County Governor is responsible for exercising executive functions under Article 186 of *the constitution* and Sections 5 and 30 of the *County Governments Act* which he exercises through officers of the County Government. That the Taskforce was appointed through exercise of his executive authority and he acted within the limits of Sections 30 (2) and 31 (d) of *County Governments Act* and that members of the Taskforce are not county public officers under the meaning of *the Constitution*



and [County Governments Act](#) but are part of the policy formulation strategy and in this case, the human resource and thus their appointment conforms with the law.

17. In further support of the Respondent's case, Mr. Mohamud Mursal, the County Secretary of Garissa County and the Chairperson of the Taskforce, swore a Further Affidavit on 29th November, 2022. He avers that to the best of his knowledge, the County Public Service Board has failed in its mandate as is required of it.
18. Mr. Mursal further states that on or about 17th May, 2022 the Controller of Budget wrote a letter dated the 17th of May 2022, to the Garissa Chief Executive Officer, Finance, Revenue, Economic Planning and County Affairs concerning draft budget estimates for the financial year 2022/23. According to the report, more than half of Garissa County's budget for the financial year 2022/2023, was going towards recurrent expenditure, with the upshot being that the County suffered several challenges including but not limited to inadequate health services and inability to focus on development projects such as building roads, hospitals, water facilities, and classrooms.
19. That due to the issues brought out by the report, the County Government of Garissa through the County Secretary wrote to the Interested Party herein requesting for provision of vital information for the period September 2017 - August 2022. The County Government of Garissa also wrote to the State Department of Public Service on 28th September, 2022 seeking technical assistance to undertake a Human Resource Audit and payroll analysis for the County Government of Garissa in order to address the concerns raised in the Audit Report.
20. In response to the said request, the State Department wrote a letter to the County Government of Garissa on 28th September, 2022, and appointed a team of officers to assist the County in undertaking the exercise with their terms of reference being:
 - i. To undertake a Human Resource Audit for the Period 2017 to 2022 in order to streamline the ballooning wage bill; and
 - ii. To analyse the payroll and make appropriate recommendations for implementation by the County Management.
21. Mr. Mursal further states that the report did raise relevant issues and set out proposed recommendations to help address the issues. That in essence, the appointment of the Task force was a noble, constitutional and statutory process that sought to remedy an already existing problem within the County Government of Garissa of a high wage bill that not only exceeds the Statutory limit of 35% and but also takes up more than 50% of the County's Annual budget thus stifling other sectors from growth.

The Interested Party's Case

22. The Interested Party responded to the Petition through the Replying Affidavit sworn on 30th November, 2022, by Ms. Elba Sahal, its Chairperson. She avers that the Interested Party is tasked with among other functions, to establish and abolish offices in the county public service, to appoint persons to hold or act in offices of the county public service and to confirm appointments and to exercise disciplinary control over, and remove persons acting in those offices. That further, the Interested Party is tasked with advising the county government on human resource management and development.
23. Ms. Elba further states that there is a fully constituted and functional County Public Service Board in Garissa County. That none of the members of the Board have been removed from office for any reason.



The Board is thereby in a position to undertake its functions in accordance with *the Constitution*, the *County Governments Act* and the relevant laws.

24. In her view, the formation of the Special Taskforce by the Respondent is not anchored on any provisions of the law and the same is a bold attempt by the Respondent to usurp the powers of the Interested Party. She is aware that amongst the members of the impugned taskforce are Mohamed Mursal, the Chairperson who is the present holder of the office of the County Secretary for Garissa county and Noor Dahir Yusuf, Abdirazack Said Aden and Mohamed Ibrahim Abdi, who have previously served as members of the County Public Service Board and whose appointment raises doubt over the impartiality and independence of the said Taskforce.
25. She further avers that the Taskforce is obliged to compile and submit a comprehensive report with clear recommendations on actions to be taken by the County Government relating to concerns raised by the staff affected by the alleged Human Resource Audit. After conducting due diligence, she is aware that the Human Resource Audit which saw the removal of over 3000 staff of the County Government of Garissa from payroll, was never conducted by the State Department of Public Service, and can only be viewed as an effort by the Respondent to purge all employees who had been working under his predecessor.
26. Ms. Elba further avers that the Respondent's action of appointing a Taskforce to undertake a function that is well within the purview of the Interested Party's mandate and without consulting it, is a clear violation of abuse of office, a threat to *the Constitution* and to the law and places no regard to the legitimate expectation by the affected members of staff.
27. Ms. Elba states that the Interested Party has had no reason to believe that any process or decision may have occurred in an irregular or fraudulent manner as to warrant it to undertake any investigation, revoke any decision, commence the process afresh or take any corrective action such as disciplinary action. That the Respondent has not sought any advice or opinion from the Interested Party on the county government's human resource management and development.
28. She contends that the Respondent has thus been acting unilaterally and has not been in consultation with the Interested Party on matters that are within its mandate as provided for under *the Constitution* and the *County Governments Act*.
29. She further states that establishment and abolishment of county public offices and appointment of persons in the county public service is a very significant function of the County Public Service Board since it relates to the workforce of the county and the overall performance of the County. That the Respondent has thus overstepped his mandate, by arrogating to the Special Taskforce the powers of the Interested Party, to undertake roles which it is not Constitutionally mandated to undertake.
30. At the time of filing the Petition, the Petitioner equally filed a Motion Application under Certificate of Urgency seeking temporary conservatory orders suspending the Taskforce on the county staff audit by Garissa County Government appointed by the Respondent pursuant to Kenya Gazette Notice No. 13821 dated 8th November, 2022. Upon considering the Application, the Court granted temporary conservatory Orders pending the hearing and determination of the Petition. By consent, the parties agreed to canvass the Petition through written submissions.

The Petitioner's Submissions

31. On her part, the Petitioner submitted that owing to the fact that the subject matter of the Petition is disciplinary action and/or termination which is an element of employment, the Court does have jurisdiction. In support of her position, the Petitioner relied on the case of *Okoti v Parliamentary*



Service Commission & 2 Others; Speaker of the National Assembly & another (Interested Parties) [2023] KEELRC 252 (KLR) and urged the Court to find that the declarations prayed for are remedies it is authorised to make.

32. The Petitioner further submitted that she has established that there is an imminent threatened injury upon the employees of the County Government of Garissa through its Governor and the institution that is mandated by statute to exercise disciplinary control over them. That moreover, she has established that the employer is a public body whose disciplinary, termination and other employment decisions are regulated by constitutional provisions and therefore, is a matter of public interest which she is entitled to champion.
33. The Petitioner further maintained that the Respondent contravened the provisions of Article 232(1) and (2) of *the Constitution* by not only failing to involve the County Public Service Board in the decision to appoint the Taskforce on County Staff Audit but also failing to provide the public with the Human Resource Audit Report allegedly prepared by the State Department for Public Service.
34. It was her further submission that the Respondent contravened the provisions of Article 27 of *the Constitution* by discriminating against County Public Service Staff by virtue of being appointed to County Public Service by his political opponents and the same is admitted in the Respondent's Further Affidavit.
35. It was further submitted by the Petitioner that the Human Resource Audit and subsequent disciplinary processes and/or termination of employees is limited to the period 2017 to 2022 when the respondent was not in office and not inclusive of 2013-2017 when he was in office. That the same amounts to differential treatment.
36. The Petitioner further argued that the Respondent contravened the provisions of Article 47(1) and (2) of *the Constitution* by condemning the County Public Service staff who have been issued with "show-cause" letters based on unknown wrongdoings or any prior warning letters.
37. The Respondent and the Interested Party did not file submissions.

Analysis and determination

38. Flowing from the Petition and the responses thereto, as well as the Petitioner's submissions, I find the singular issue for determination being, whether the Respondent acted within *the Constitution* and the law in establishing the Taskforce on county staff audit.
39. In order to resolve this question, I find it imperative to revisit the terms of reference of the Taskforce in terms of Gazette Notice 13821, thus: -
 - i. To hear any concerns that may be raised by staff who may have been affected by the recommendations of the recent Human Resource Audit.
 - ii. Compile and submit a comprehensive report with clear recommendations of actions to be taken by the County Government relating to issues that arise from point one above.
40. Prior to the establishment of the Taskforce, it is apparent that the Ministry of Public Service, Gender and Affirmative Action State Department for Public Service, had undertaken a human resource audit at Garissa County.
41. As stated by Mr. Mursal in his Further Affidavit, the Taskforce was set up following the issues raised in the aforesaid Human Resource Audit Report. A perusal of the Human Resource Audit Report reveals that the audit team undertook an analysis of several issues for instance staffing levels at the



county, appointments, promotions and exit of officers upon attaining the age of retirement. The analysis was followed by recommendations to address the issues arising. It is not in dispute that these issues raised in the Audit Report relate to management of the human resource function at the county government.

42. Pursuant to Article 235 of *the Constitution*, each county government is given the responsibility of establishing and abolishing offices in its public service, appointing persons to hold or act in those office, and confirming appointments and exercising disciplinary control over and removing persons holding or acting in those offices.
43. The aforementioned functions are exercised through the County Public Service Boards being corporate bodies established in each county under Section 57 of the *County Governments Act* (CGA). The functions of the County Public Service Boards are to be found in Section 59 of the CGA, which mandates each Board to perform the following functions on behalf of its respective government: -
 - (a) establish and abolish offices in the county public service;
 - (b) 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;
 - (c) exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part;
 - (d) prepare regular reports for submission to the county assembly on the execution of the functions of the Board;
 - (e) promote in the county public service the values and principles referred to in Articles 10 and 232;
 - (f) 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;
 - (g) facilitate the development of coherent, integrated human resource planning and budgeting for personnel emoluments in counties;
 - (h) advise the county government on implementation and development;
 - (i) advise county government on implementation and monitoring of the national performance management system in counties;
 - (j) make recommendations to the Salaries and Remuneration Commission, on behalf of the county government, on the remuneration, pension and gratuities for county public service employees.

44. It is therefore clear that County Public Service Boards are responsible for establishment of offices at the county level, appointments, discipline, removal of persons holding county public service offices and performance management.

45. As was rightly held by the Court of Appeal in *Kisumu County Public Service Board & another v Samuel Okuro & 7 others* [2018] eKLR: -

“It is apparent that unlike the position of the county executive member, the intention of the framers of *the Constitution* in providing for the establishment of County Public



Service Boards, was to ensure that there is a corporate body similar to the Public Service Commission in the national Government that is responsible for the regulation of employment of officers in the county public service. This was to ensure some element of stability in the management of the human resource in the county public service given that the county executive committee would keep changing.”

46. The bottom line is that performance of functions related to human resource management in county governments is within the purview of the County Public Service Boards.
47. As a matter of fact, the Human Resource Audit Report acknowledged the functions and powers of the County Public Service Boards in the appointments and management of the human resource in the county public service.
48. In the case herein, the County Public Service Board, Garissa County was enjoined as an Interested Party and on its part, it maintained that the Respondent did not seek its advice or opinion on the county government’s human resource management and development. The Interested Party further termed the Taskforce as an illegal body not anchored in law and accused it of purporting to arrogate itself its (Interested Party) functions.
49. A careful consideration of Section 59 of the CGA as read together with Article 235 of *the Constitution*, leaves no doubt that the terms of reference of the Taskforce constituted by the Respondent through Gazette Notice 13821, overlap with the functions of the Interested Party.
50. Further compounding the issue of overlap, is the communication emanating from the joint secretaries of the Taskforce on 13th November, 2022, notifying the staff at the county and the general public inter alia, that: -
 - a. All affected officers are eligible to appear before the taskforce and present the merit of their cases. Officers are expected to pick their letters from their respective departments from Monday 14th November, 2022 prior to appearing before the taskforce.
 - b. The taskforce has developed a schedule as attached. Officers are expected to appear before the taskforce on the scheduled department timelines. However, those who turn up on Monday and are willing will be offered an opportunity to be heard.
 - c. That subsequent to communication to individual affected officers, you are reminded to provide copies of all relevant documents relating to their respective concerns including appointments, promotions and any other engagement with the County Government of Garissa.
51. The contents of the aforementioned communication lead me to further question the extent of the mandate to be exercised by the Taskforce noting that the terms of reference were broad. I further question whether the Taskforce was undertaking an investigatory or disciplinary role? What would be end result of the entire excise? Further, it is notable that the Audit Report made a general analysis and recommendations on each aspect of the area they were auditing for instance appointments and promotions. It is not clear whether a further Audit had been undertaken to identify the specific staff affected and if so, in what manner were they affected and had they been informed as much? and more importantly, upon receiving the report, did the Respondent bring the same to the attention of the Interested Party noting that it raised irregularities with regards to the management of the human resource function at the County Government?



52. What is not in doubt, is that the only body with the mandate to undertake any aspect of the human resource of officers in the county public service, is the County Public Service Board. Therefore, it is clear that the Taskforce appointed by the Respondent if allowed to proceed as per its Terms of Reference, would essentially be encroaching on the mandate of the Interested Party and in so doing, will be acting contrary to the spirit of Article 235 as read together with Section 59 of the CGA.
53. It is against this background that the Court finds that the Respondent lacked the legal mandate to establish the Taskforce on County Staff Audit through Gazette Notice No. 13821. I reiterate, such appointment had no backing in law.
54. Before I pen off, I must point out that a perusal of the Human Resource Audit Report exhibited by the Respondent reveals a number of irregularities related to the general management of the human resource at the County Government of Garissa. I will highlight a few: -
- a. Various appointments were done at the county by different appointing authorities including the County Public Service Board, County Secretary, Department Chief Officers, CECs and Directors.
 - b. There were irregular appointments of 1,315 staff where appointments were done without following the right procedures as per the County Governments Act. There was no indication that the Interested Party made advertisement of posts and that appointment of officers were done by officers not authorised by the law nor delegated to by Board.
 - c. There were 93 irregular promotions done by different appointing authorities and it is not clear whether the Interested Party, which is mandated with making promotions had delegated this duty to the said authorities. In addition, during the promotions, staff skipped various job groups in a period of 1-2 years against the requisite period of 3 years.
 - d. There were 1,239 officers who did not have files in the registry which points to poor record keeping in the county. In addition, some members of staff either had no files or those with files had missing documents.
 - e. As regards the number of officers employed or promoted each year, it was found that there were cases where the Date of First Appointment differs from the Current date of Appointment in the payroll.
 - f. 101 staff are over 60 years of age yet they are still in the payroll which is in contravention with the County Governments Act, Articles 79 and 80 of the Constitution and Human Resource Policies and Procedures Manual, 2016.
 - g. Officers appointed to high job groups and appointed to act on higher positions did not have the requisite qualifications for the posts.
55. No doubt, the foregoing issues are quite grave and in the circumstances, I cannot help but question the role of the Interested Party in all this and whether it has performed its role effectively. This is bearing in mind its powers under Section 75 of the CGA. However, as this was not an issue for determination before me, I will leave it at that.



Order

56. The total sum of my consideration is that the Petition dated 14th November, 2022, succeeds and a declaration is hereby issued that the Respondent did not have the legal mandate to establish the Taskforce on County Staff Audit as he did through Kenya Gazette Notice No. 13821 dated 8th November, 2022.

57. Given the nature of these proceedings, I order each party to bear its own costs of the Petition.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY, 2023.

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STELLA RUTTO

JUDGE

Appearance:

Mr. Obunde for the Petitioner

Mr. Achola for the Respondent

Mr. Bashir for the Interested party

Court Assistant Abdimalik Hussein

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

