



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Katima v Nairobi City County Assembly Service Board & another (Petition E160 of 2022) [2023] KEELRC 1656 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1656 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**PETITION E160 OF 2022**  
**MN NDUMA, J**  
**JULY 6, 2023**  
**IN THE MATTER OF: ARTICLES 10, 19, 20, 21, 22, 23, 27, 35, 41**  
**AND 232 OF THE CONSTITUTION OF KENYA, 2010**  
**AND**  
**IN THE MATTER OF: THE CONSTITUTION OF KENYA**  
**(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)**  
**PRACTICE AND PROCEDURE RULES, 2013**  
**AND**  
**IN THE MATTER OF: SECTIONS 12, 13, 55 AND 68 OF THE COUNTY**  
**GOVERNMENTS ACT, 2012**  
**AND**  
**IN THE MATTER OF: SECTIONS 5, 11, 24 AND 29, OF THE COUNTY**  
**ASSEMBLY SERVICES ACT, 2017**  
**AND**  
**IN THE MATTER OF: SECTIONS 10 OF THE PUBLIC SERVICE**  
**(VALUES AND PRINCIPLES) ACT, 2015**  
**AND**  
**IN THE MATTER OF: ILLEGAL ADVERTISEMENT AND**  
**RECRUITMENT OF STAFF BY THE NAIROBI CITY COUNTY**  
**ASSEMBLY SERVICE BOARD**  
  
**BETWEEN**



LESIYIO KATIMA ..... PETITIONER

AND

THE NAIROBI CITY COUNTY ASSEMBLY SERVICE

BOARD ..... 1<sup>ST</sup> RESPONDENT

THE CLERK/ SECRETARY NAIROBI CITY COUNTY ASSEMBLY SERVICE

BOARD ..... 2<sup>ND</sup> RESPONDENT

### JUDGMENT

1. The Petition was filed on September 5, 2022 seeking for an Order in the following terms:-
  - a. A declaration that the 1<sup>st</sup> Respondent can only declare vacancies in the Board, advertise and fill the vacancies in the presence of a fully and properly constituted County Assembly Service Board;
  - b. A declaration that the advertisement placed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in The Standard and The Star Newspapers on August 22, 2022, purporting to declare vacancies in the County Assembly Service and invite applicants to fill them contravened the Consent Judgement entered in ELRC E169 of 2021: *Lesiyio Katima v The Clerk, Nairobi City County Assembly Service Board And Nairobi City County Assembly Service Board*;
  - (c) A declaration that the advertisement placed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in The Standard and The Star newspapers on August 22, 2022, purporting to declare vacancies in the County Assembly Service and invite applicants to fill them contravened Court Orders issued on August 19, 2021 by this Court in ELRC Petition E130 of 2021: *Sheila Munubi v Ada Onyango & Nairobi City County Assembly Service Board*;
  - d. A declaration that the advertisement placed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent in The Standard and The Star newspapers on August 22, 2022, purporting to declare vacancies in the County Assembly Service and invite applicants to fill them contravened paragraph B.8.2 of the Nairobi City County Assembly Service Human Resource Policy Manual 2017;
  - e. A declaration that the 1<sup>st</sup> Respondent having contracted and adopted the Organizational Review Report of Deloitte and Touche in the accordance with , any creation of public offices, advertisement for the same, and filling-up whether through promotions or direct appointment must be in accordance with the adopted Organizational Review Report of Deloitte and Touche;
  - f. A declaration that appointments by the 1<sup>st</sup> Respondent are appointments in public service and must adhere to Articles 10 (2) (c), 27 (3) and 232 (2) (g)-(i) of the Constitution of Kenya, 2010;
  - g. A declaration restraining 1<sup>st</sup> Respondent, from illegally and irregularly advertising for, interviewing and filling up the positions in the 1<sup>st</sup> Respondent as contained in the advertisement placed in The Standard and The Star newspapers dated 22<sup>nd</sup> August, 2022.
  - h. An order of certiorari quashing the decision of the 1<sup>st</sup> Respondent, to interview, filling-up, recruit, employ, confirm the position in the 1<sup>st</sup> Respondent illegally and irregularly advertised and interviewed for as contained in the advertisement placed in The Standard and The Star newspapers dated 22<sup>nd</sup> August, 2022;



- i. Costs of and incidental to this petition.

### **Facts of the Petition**

2. The 1<sup>st</sup> and 2<sup>nd</sup> respondents placed an advertisement in the standard and The Star Newspapers dated 22<sup>nd</sup> August, 2022 for recruitment of staff of the County Assembly.
3. That the 1<sup>st</sup> respondent was in the process of establishing a new Organisation Structure of the Nairobi City County Assembly Service, which process had not been concluded.
4. That vide a Court Order in ELRC Petition E130 of 2021, *Sheila Munubi v J. Ada Onyango and Nairobi City County Assembly Service Board*, the Court enjoined the 1<sup>st</sup> respondent from filling any positions pending the hearing and determination of the Application in that matter.
5. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents have therefore commenced illegally, a recruitment process contrary to the Orders of the Court aforesaid and in ELRC E169 of 2021 *Lesiyio Katima v The Clerk, Nairobi City County Assembly Service Board and Nairobi City County Assembly Service Board*.
6. That the Nairobi County Assembly Service Board ceased to be properly constituted as the term of the members appointed under Section 12(3) (c) came to an end on midnight of 8<sup>th</sup> August, 2022 as the nomination of the said members depends on the outcome of the general election.
7. Therefore, the 1<sup>st</sup> respondent had no capacity to place the advertisement for recruitment of employees as at 22<sup>nd</sup> August, 2022 when the advertisement was placed.
8. The two board members who were left as caretaker members in terms of Section 12(3) (d) upon dissolution of the County Assembly may only perform some limited board duties and functions, serving only to maintain the status quo rather than perform critical board functions such as recruitment of the Service or establishment of offices within the service.
9. The purported recruitment does not adhere to the new structure recommended for adoption by Deloitte and Touche in their report to the 1<sup>st</sup> respondent. The advertisement has created illegal offices outside the approved County Assembly Scheme of Service with career progression guidelines and positions including the position of Principal Security Officer which is not in the existing establishment.

### **Constitutional Provisions Violated**

10. The petitioner states that the respondents have violated Articles 10, 41 and 232 of the *Constitution* of Kenya, 2010 in:-
  - (a) failing to adhere to the National values; and principles that include good governance, integrity, transparency and accountability;
  - (b) by disregard of fair labour practices and
  - (c) By not taking the principles of Public Service which include fair competition and merit as a basis for recruitment and promotions and representation of Kenya's diverse communities.
11. The petitioner has also listed various statutory provisions which have been violated by the petitioners under paragraph 36(a) to h of the petition including Sections 12 of *County Governments Act*, Section 5, 11, 24 and 2 of *County Assemblies Service Act* and Section 10 of the *Public Services (Values and Principles) Act* on recruitment and promotion based on meritocracy.



12. That the respondents have also violated Paragraphs B.8.2 and B.5 of the Nairobi City County Assembly Service Human Resource Policy Manual, 2017.
13. That the petitioner and the Public at large have been caused grave and irreparable loss, harm and damage including discrimination hence the reliefs sought.

### **Response to the petition**

14. In the response to the petition dated 29<sup>th</sup> October, 2022, the respondents state as in the Grounds of opposition dated 21<sup>st</sup> September, 2022 that the petitioner lacks capacity to bring this suit since the respondent is in doubt if he actually exists; is a resident of Nairobi City County and in whose interest the petition has been brought. That his true identity is unknown to the respondents yet he is a perennial litigant against the respondents.
15. That the petitioner has not demonstrated his interest in the positions advertised and has not demonstrated capacity to be employed in the positions advertised.
16. That the petition is scandalous, vexatious and an abuse of Court process and cannot be sustained by a faceless unknown person. The Court lacks jurisdiction to entertain a petition from such unknown person in law or fact.
17. That the Nairobi City County Assembly Service Board was at all material times properly constituted and the petitioner has not adduced any evidence to the contrary. That the resolution passed by the Assembly to recruit persons to the advertised positions is lawful. The 2<sup>nd</sup> respondent placed the advertisement on the 11<sup>th</sup> August, 2021 newspaper in execution of the resolution by the 1<sup>st</sup> respondent.
18. That the orders in ELRC Petition E130 of 2021, *Sheila Murubi v Adah Onyango (The Acting Clerk and the Nairobi City County Assembly Service Board)* were very specific to the jobs advertised then and the orders have no nexus whatsoever with the impugned advertised positions, the subject of the instant petition.
19. In any event, the said orders read partly:-

“That pending hearing of the Application interpartes, the Respondents are at liberty to continue receiving the advertised job applications but shall not fill the Advertised positions (emphasis made)”
20. In any event, Orders of Court are enforced vide contempt of Court applications within the same suit but not by filing a new petition as the petitioner has done. This Court lacks jurisdiction to entertain a fresh petition to enforce orders made in a different suit by a different judge. This is clearly misguided abuse of Court process.
21. That ELRC E119 of 2021, *Lesiyio Katima v The Clerk, Nairobi City County Assembly Service Board* is a matter that is still active in Court.
22. The County Assembly has since made an application to review and set aside the now impugned consent judgment and the matter came up for Ruling on 3<sup>rd</sup> November, 2022. The County Assembly has since debriefed the Advocate who connived and colluded with the petitioner herein to record a consent without the County Assembly’s knowledge. In any event, the orders issued in ELRC E169 of 2021 only affected the advertisement that had been placed by the County Assembly on 25<sup>th</sup> June, 2022 and the respondents have not violated the consent orders as alleged or at all.



23. That the allegation that the Nairobi City County Assembly Service Board ceased to exist is a fallacy on the part of the petitioner. That the Board is a body complete with perpetual succession as per Section 12(2) of the County Governments Act as read together with the County Assembly Services Act Section 12(3). The Board was properly constituted in terms of Quorum as per the Second Schedule of the County Assembly Services Act, paragraph (5).

“ 5. That Quorum for a meeting of the Board shall be three members.”

24. Therefore, as of 8<sup>th</sup> August, 2022 the Board had quorum. The allegations by the petitioner are thus false. That there is nothing called “Caretaker board members” referred to by the petitioner. This is absurd terminology introduced by the petitioner in this matter.

25. That no illegal office outside the establishment of the 1<sup>st</sup> and 2<sup>nd</sup> respondents have been created or advertised by the respondents.

26. That the petition lacks merit and it be dismissed with costs.

27. The parties filed submissions and list of authorities, which the Court has carefully considered together with the depositions by the parties. The issues for determination are:-

(i) Whether the petition has disclosed any violations of the Constitutional right of the petitioner and/ or the public the petitioner states he represents.

(ii) Whether the petition has any merit.

(iii) Whether the petitioner is entitled to the reliefs sought.

28. The Court notes at the outset that despite deposition by the respondents under oath that the petitioner is a faceless, non-existent person and has not adequately disclosed his identify and whose interest he represents, the petitioner did not make any rejoinder to those serious allegations made by the respondents in a further and or supplementary affidavit. The Court is therefore left in doubt as to the existence, residence and actual identity of the petitioner. The Court has however given the petitioner the benefit of doubt and proceeds to deal with the next preliminary issue, which is whether, the petitioner ought to have moved an application for contempt of Court to enforce the orders he alleges have been disobeyed by the respondents in the pending cases before ELRC Petition No. E130 of 2021 (*supra*) and ELRC 169 of 2021 (*supra*).

29. Closely connected to this issue therefore is whether the matters sought to be enforced here are properly the subject of a constitutional petition within the meaning of the case of Anarita Karimi Njeru v Republic [1979] eKLR.

30. Secondly, in the event the said matters amount to constitutional violations, whether the same have been pleaded with specificity in the petition to warrant consideration and determination by the Court in the manner sought by the petitioner.

31. To the extent that the petitioner has taken no effort at all to fully identify himself and his interest in this matter, given that the petitioner still has a pending petition ELRC 169 of 2021 (*supra*) in which he would have otherwise brought an application for contempt to ensure compliance with the orders of the Court in that matter, the Court agrees with the submissions by the respondents that this present petition was completely unnecessary and the Court deems it to be vexatious litigation within the meaning attributed to it in the case of Madison Insurance Company Limited v Augustine Kamanda



*Gitau* [2020] eKLR by Odunga, J. where he cited the decision in *Willis v Earl Beauchamp* (1886) 11PD 59 at paragraph 18 as follows:-

“A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (i) it is brought so that the party’s pleadings should have some financial advantage; or where it can really lead to no possible good.”

32. It is the Court’s considered finding that the petition as filed does not disclose with any specificity a violation of any provision of our Constitution but is a misguided attempt to use a petition to enforce interim orders, in another suit, where the petitioner is a litigant instead of filing an interlocutory application for contempt of Court in the previous suit being ELRC E169/2021. The petition does not therefore disclose any justifiable issue that cannot be resolved in the pending suits aforesaid.
33. To the extent that the petitioner has not bothered to explicitly explain his identify and interest in this matter, the petition lacks locus standi within the meaning attributed to it in *Kbelef Khalifa El-Busaidy v Commissioner of Lands and 2 Others* [2002] eKLR:-

“for an individual to have a locus standi, he must have an interest either vested or contingent in the subject matter before the Court which interest must be a legal one. Such interest must be above that of other members of the public in general.”
34. The petitioner only describes himself as a resident of Nairobi conversant with matters in controversy in the petition.
34. The petitioner has failed to prove on a balance of probabilities that the action by the respondent herein of advertising vacant positions has prejudiced and or is a threat to the rights of any identified members of the public especially in view of interim orders already in place in two other matters, one of which the petitioner is the dominus litis
35. Accordingly, this petition lacks merit and is dismissed with the parties to bear their own costs of the suit.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 6<sup>TH</sup> DAY OF JULY, 2023.**

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Mr. Mkamba for the petitioner

Mr. Ashoya for the Respondent

Ekale – Court Assistant

