



**Kenya County Government Workers Union v Murang'a County Government & 2 others  
(Cause E047 of 2022) [2023] KEELRC 2574 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2574 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E047 OF 2022  
ON MAKAU, J  
OCTOBER 19, 2023**

**BETWEEN**

**KENYA COUNTY GOVERNMENT WORKERS UNION ..... CLAIMANT**

**AND**

**MURANG'A COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**MURANG'A COUNTY PUBLIC SERVICE BOARD ..... 2<sup>ND</sup> RESPONDENT**

**MURANG'A COUNTY SECRETARY ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant has brought a Memorandum of Claim dated 13<sup>th</sup> December 2022 under Articles 10, 19, 20, 21, 22, 23, 41, 47, 162(2) (a), 232, 258 and 260 of *the Constitution*, seeking the following reliefs:
  - a. A Declaration that the Respondents' treatment of the Claimant's members is and was unfair, unlawful and contrary to *the Constitution* and the *Employment Act* on rights to fair labour practices.
  - b. A declaration that the Claimant's members are entitled to the same treatment and terms of employment as employees in the same category and their counterparts employed by the devolved governments.
  - c. A declaration that the Claimant's members' fundamental rights and freedoms under Article 41 and 47 of *the Constitution* have been violated by the Respondents.
  - d. A declaration that the letter dated 30<sup>th</sup> November 2022 in relation to the Claimant's members is irregular, unlawful and contrary to the law hence null and void ab initio.



- e. An order do issue quashing the letter dated 30<sup>th</sup> November 2022 as well as the decisions contained in the letter dated 30<sup>th</sup> November 2022 and the suitability tests concluded by the Respondents, its agents, officers or persons acting under their instructions.
  - f. Costs of this claim.
  - g. Any other relief that this Honourable Court may deem just to grant.
2. Together with the suit, claimant filed notice of motion seeking injunction to stop the respondent from carrying out the impugned suitability tests pending hearing and determination of the suit. However as at the date fixed for inter-partes hearing of the motion, the tests had allegedly been done and as such, by consent the court restrained the respondents from releasing the results of the suitability tests.
  3. The respondent filed Response to the Claim dated 10<sup>th</sup> January 2023 denying of all the allegations of wrong doing attributed to it and averred that the suitability tests were beneficial to the grievants. Therefore, it prayed for the suit to be dismissed with costs.

### **Factual Background**

4. The Claimant has pleaded that the Respondents discriminated against its members on grounds of their union affiliation and for being former employees of the defunct local authorities. It has outlined the particulars of victimization and discrimination in the following manner:
  - a. Vide a letter dated 30<sup>th</sup> November 2022, the Respondents purported to have suitability tests and/or interviews that were to be conducted on 14<sup>th</sup> and 15<sup>th</sup> December 2022.
  - b. Further to that, and peculiarly so, only the Claimant's members who were previously employed by the defunct local authority are having the said suitability conducted against them and not employees engaged under the devolved government.
  - c. The Claimant's members who were previously employed by the defunct local authority discriminately have been singled out by the Respondents for this exercise.
  - d. The said suitability interviews are ill-motivated, unfair and unlawful actions are aimed at terminating the Claimant's members using the back door.
5. The Claimant averred that it wrote to the Respondent vide letter dated 8<sup>th</sup> December 2022 seeking an explanation on the purpose of the exercise and the reason as to why only employees of the defunct local authorities were singled out but the same did not yield any response. Hence the instant suit.
6. The Claimant claimed that if no action is taken then its members are likely to lose their employment through an irregular and illegal procedure by the Respondents and as a result cause its members extreme hardship and injustice.
7. The Claimant stated that unless the Respondents' actions are restrained, its members' rights would continue to be infringed. It averred that the court has jurisdiction to interfere with the impugned process and cited the case of *Geoffrey Mworira v Water Resources Management Authority & 2 others* [2015] eKLR where this Court held that it had the jurisdiction to interfere with the human resource functions of an employer where it is shown that the employer is proceeding in breach of an agreement between parties or in a manner manifestly unfair in the circumstances of the case.
8. The Claimant asserted that the Respondents were using calculated moves to terminate its members' employment illegally as the same was not based on any legal underpinning but political and therefore it urged this Court to halt any recruitment of new employees to the positions held by its members.



9. The Respondents is in denial of the alleged victimization and discrimination. It further denied the Claimant lacks locus standi to represent the grievants contending that there is no recognition agreement between it and the Claimant. Further only 216 out of 7000 employees are members of the union.
10. The Respondents avers that some employees absorbed from the defunct local authorities wrote a letter to the 1<sup>st</sup> Respondent requested for promotion and pay rise. Thereafter, the respondents held consultations and resolved that suitability test was necessary to settle the issue of promotions and salaries. The exercise was to involve all the former employees of the defunct local authorities, as opposed to the nine employees who had sought for the same. The respondents aver that the suitability test was only for purposes of promotion and pay increase and not for termination purposes.
11. Accordingly, the 2<sup>nd</sup> respondent invited all the employees absorbed from the defunct local authorities for the suitability test vide the impugned letters. The Respondents deny that the intended suitability test was discriminatory and contend that the exercise was not the first to be undertaken in the county. They further aver that the exercise was not intended to fire the employees but for their benefit.

### **Evidence**

12. The Claimant called Mr. Bernard Kimani Wanjiku, as its witness and he testified as CW1. He works for the Murang'a County Government and he is also the Claimant's branch secretary in the county. He adopted his witness statement dated 8<sup>th</sup> February 2023 as his evidence in chief. He further produced as exhibits nine (9) documents in the Claimant's lists dated 13<sup>th</sup> December 2022 and 19<sup>th</sup> January 2023.
13. His evidence was that the respondents are engaging in acts of discrimination against the claimant's members on account of being former employees of the defunct local authorities and also for being in a union. He stated that the by a letter dated 30<sup>th</sup> November 2022, the respondents singled out the former employees of the defunct local authorities to undergo suitability tests/interviews which is aimed at terminating the employment of the said employees using the back door.
14. He contended that by a letter dated 8<sup>th</sup> December,2022, the claimant sought explanation from the respondents, as to the purpose of the intended suitability interviews. It also enquired why only the employees of the former local authorities were singled out but no response was given and hence this suit. He contended that the exercise by the respondents is unfair and unlawful because it is proceeding unilaterally without the claimant's request or consultation. He stated that in other counties where the same exercise was done, some employees lost their jobs. Therefore, he prayed for the reliefs sought in the statement of claim.
15. On cross examination, he stated that he is a supervisor in the revenue department of the County but before he had worked for the defunct local authority from 2007. He testified that he applied for the vacancy, attended interview and got promotion. He admitted that without the interview he would not have been promoted.
16. He also stated that there are 205 county employees who are members of the claimant and they were all invited for the suitability test vide the letter of 30<sup>th</sup> November 2022. The letter directed all the heads of departments to tell their staff to attend the suitability test. The letter attached a list of 267 employees including the 205 members of the claimant. CW1 also received his invitation through his head of department who further asked him to notify the staff under his supervision. He never received any invitation letter addressed to him personally.



17. He clarified that this suit is filed on behalf of the 205 members only and as such the reliefs sought should be limited only to the 205 members of the claimant. He further clarified that he is not concerned with the others who were affected by the impugned letter dated 30<sup>th</sup> November, 2022.
18. He testified that the impugned suitability test is suspect since there are no vacancies declared. It is also suspect since it is targeting only the staff of defunct local authorities. He denied being aware that his colleagues requested for the suitability interview. He admitted that none of the members lost his job after the suitability interview but he contended that members lost jobs after the same exercise was done in Laikipia County.
19. He admitted being aware that a number of their members had stagnated in one position for a long time and that they should be interviewed if it is for a good cause. However, he maintained that the impugned interview is not in good faith or for a good cause since it discriminated against the employees of the defunct local authorities.
20. The Respondent called Mr. Dominic Mathenge the Secretary CPSB Muranga as RW1. He adopted the affidavit sworn on 10<sup>th</sup> January 2023 as his evidence in chief and also produced as exhibits 5 documents annexed to the affidavit. In brief, his evidence is that the claimant only represents 216 out of 7000 employees of the respondent. There are three categories of employees including those from the defunct local authorities. By a letter dated 28<sup>th</sup> March 2022, 9 of the former employees of the defunct local authorities requested the 1<sup>st</sup> respondent for promotion and pay rise. The 1<sup>st</sup> respondent then wrote a letter dated 13<sup>th</sup> April 2022 to the 2<sup>nd</sup> respondent requesting for advice.
21. The 2nd respondent met on 29<sup>th</sup> November, 2022 and resolved to invite all the employees from the defunct local authorities for suitability test in order to assess their suitability for promotion or pay rise, once and for all. The tests were not intended to terminate employment or alter their terms of service negatively. The said exercise is not new in the county public service as many others have been done over the years for the benefit of the employees. The 2nd respondent admits being aware that it has no power to act outside *the constitution* or the statute law since employees are protected by the law. It urged the court to allow it conduct the suitability tests for those who are willing to be considered for promotion or pay rise.
22. On cross examination, RW1 reiterated that there was no CBA between the Claimant and Murang'a County but admitted that there was one signed with the defunct local authorities. He stated that he had been working for the Respondents since devolution started and that he used to be a union member. He admitted that there was no consultation between the Claimant and CPSB before the letter dated 30<sup>th</sup> November 2022 were issued.
23. He also admitted that the letter by the union dated 8<sup>th</sup> December 2022 was never responded to because the issues raised were unnecessary. He stated that the best way forward was to finish the interviews and then address the grievances thereafter. He reiterated that there was no recognition agreement with the union upon which they could base any negotiation.
24. He testified that the reason they initiated the suitability interviews was a letter by nine employees requesting the County Government for promotion. He admitted, however, that the nine employees had no authority to represent the other employees in the request. He further admitted that the interviews targeted only the 267 employees from the defunct local authorities as per the list attached to his letter of 30<sup>th</sup> November 2022. He agreed that all the 7000 county employees should to be treated equally.



25. He testified that the claimant was not invited to the board meeting held on 29<sup>th</sup> November 2022 where it was decided that all the employees of defunct local authorities be subjected to the interviews. He admitted that the union did not request for the interviews. He confirmed that the interviews were conducted but the results were never released due to the court order. He also testified that all the 267 employees attended the interviews. However, he confirmed that Mrs Mwangi number 46 on the list was a retiree while Mr. Ramadhan at number 52 was deceased.
26. He maintained that there were previous suitability interviews done and referred to the results attached to his affidavit. He stated that the Board was conducting interviews for employees who felt that they were being disadvantaged. However, he admitted that he had evidence of the criteria used for determining the suitability test. He admitted that the three groups of employees were treated separately but clarified that there was no intention to discriminate. He stated that the number of employees invited for the suitability test was larger than the number of the Claimant's members.
27. He told the Court that if the letter is quashed only the employees stood to suffer as the government would not suffer any harm. He reiterated that the interviews are good and for the benefits of the employees. Finally, he stated that his letter of 30<sup>th</sup> November 2022 was based on instructions from the Board.

### **Claimant's Submissions**

28. The Claimant submitted on the following issues:
  - a. Whether the Claimant has previously agitated for the rights of its concerned members, previously employed by the defunct local authorities, in relation to their engagement with the Respondent?
  - b. Whether the Respondents had an obligation to consult the Claimant and/or its members before undertaking to invite the Claimant's concerned members to the suitability interviews?
  - c. Whether the request for promotion and/or salary increment of a select few members of the Claimants binds all other concerned members of the Claimant?
  - d. Whether the Respondents have a legal obligation to treat all their employees equally?
  - e. Whether the invitation extended to the Claimant's members to undergo suitability interviews is valid?
29. It was submitted for the Claimant that it has produced documents to prove that it has always agitated for the rights of its members and that it had written to the respondents raising certain grievances on behalf of the members. Some of grievances raised include the Respondent's failure to remit statutory deductions, the failure to convert ECDE teachers to permanent and pensionable employment and also on the Collective Bargaining Agreement dated 1<sup>st</sup> September 2012. In addition, the claimant wrote a letter dated 8<sup>th</sup> December, 2022 before filing this suit. Therefore, it was urged that the Respondents are misleading the Court by alleging that the Claimant lacks the capacity to represent its members.
30. It was further submitted that the Respondent ought to have consulted with the Claimant, as provided in section 10 (5) of the *Employment Act* before embarking on revision of contracts for the union members. For emphasis, reliance was placed on the cases of *Melisa Akinyi Ayoyi v Claudio Benaglia t/a Royal Tulia Resort* [2018] eKLR where the Court condemned unilateral changes in contracts of employment. Further reliance was placed on the case of *Susan Murila & another (COTU) v Richard*



Kipkoech Langat & another [2019] eKLR where the court held that section 10(5) of the Employment Act is couched in mandatory terms.

31. It was argued that the suitability test by the Respondents was intended to alter the employment terms and also to edge them out of employment. The reason for the said intention was because the employees were from the defunct local authorities and also members of the union. It was reiterated that if the intention of the impugned tests was to alter the terms of the employees' contracts, promotion and salaries increment, then the respondents had obligation to consult them or the Claimant under section 10 (5) of the Act.
32. It was further submitted that, there is a CBA dated 1<sup>st</sup> September 2012 which is still applicable to "Officers of the Local Authorities and the Councils' Water Companies who are appointed to pensionable posts within the permanent establishment." For emphasis reliance was placed on the decision by Marete J in the case of Kenya County Government Workers Union v County Government of Bomet & 3 others [2016] eKLR where the Court referred to the Guiding Book for Governors under section 6.6 with respect to employees of the defunct Local Authorities.
33. In view of the foregoing, the Claimant submitted that by dint of the Transition Clause, the terms of engagement between it and the Respondent remained the same. Further that, the Claimant remained to be the representative of the employees even after the absorption into the County Government. It was also submitted that the Claimant's letter to the then Governor dated 7<sup>th</sup> August 2020 was proof of the respondents had been informed that the claimant represents a simple majority of the county workers and therefore it was an important stakeholder in matters concerning their welfare.
34. It was submitted further that the claimant had had previously engaged the Respondents in negotiations of CBA terms on matters compensation and promotion of its members. It was also submitted that by a letter of 1<sup>st</sup> August 2020 to the Governor, the claimant had complained about unfair labour practices against its members. Reliance was placed on section 4 (1) of the Fair Administrative Actions Act to submit that the respondents have not responded to the aforesaid letters and as such the correspondences have remained one way.
35. It was further submitted that the Respondents' actions to undertake the suitability test on all the claimant's members on basis of request by 9 employees was against the law of contract as the 9 employees did not have the authority to act on behalf of all. It was argued that the rest of the employees were not privy to the negotiations between the nine employees and the respondent.
36. It was submitted that RW1 had testified that all the invited employees attended the suitability tests yet some people in the list were either deceased and retirees. The case in point was that of Mwangi Rose Wangari who had retired and Kahumbi Asman Ramadhan who is deceased yet their names appeared as numbers 46 and 52 on the list.
37. It was argued that had the test been in good faith, the invitation letter would have indicated the intent of the test as was the norm in the previous years. For emphasis, the Court was referred to the schedule marked DM5 in the Respondents' Replying Affidavit dated 10<sup>th</sup> January 2023. Further reliance was placed on the Supreme Court decision in the case of Simon Gitau Gichuru v Package Insurance Brokers Ltd [2020] eKLR where the Court defined discrimination. In this case, it was submitted that the Respondents have admitted that they invited only the former employees of the Defunct local authorities for the tests.
38. It was also argued that the decision to invite all the claimant's members for the suitability tests was arbitrary and unreasonable as it was held in the case of Mohammed Abduba Dida v Debate Media Limited & another [2018] eKLR. Further the court was urged to take note that the minutes for the



meeting where the Board resolve to conduct the impugned tests have not been produced in support of that assertion. It was submitted that the validity of the invitation to the suitability interviews was not substantiated and therefore the test was arbitrary.

39. In conclusion, the Claimant urged the Court to find that the interviews focusing only on its members was illegal, unlawful, invalid and amounting to unfair labour practice.

### **Respondent's Submission**

40. The Respondents submitted on the following two issues:
- a. Whether the suitability interviews conducted by the County Public Service Board were unfair, unlawful and contrary to *the Constitution* and the *Employment Act* on rights to fair labour practices.
  - b. Whether the suitability interviews on the Claimant's members amounts to a discriminatory conduct on the part of the Public Service Board (CPSB).
41. From the onset, it was submitted for the respondents that section 59 of the County Government Act outlines the powers and functions of the 2<sup>nd</sup> respondent including conducting of suitability interviews. Therefore, it was argued that the impugned suitability interviews were within the powers of the 2<sup>nd</sup> respondent's mandate. Further that, the interviews were lawful since they were intended to establish the employees who were entitled to promotions and salary increment.
42. It was further submitted that the respondents are in cognizant of Section 138 of the County Government Act and as such they had absorbed the employees from the defunct local authorities in performance of its mandate. They deemed the Claimant's suit as premature and without any cause of action.
43. It was reiterated that the Respondents organized the impugned interviews following request by nine employees who sought for promotion and salary increment vide the letter of 28<sup>th</sup> March 2022. The letter sought for reasons behind their denial of their promotion and salary increment requests since 2018. They argued that their decision to conduct interviews were in adherence with the spirit of *the Constitution* and the principle of fairness.
44. It was reiterated further that the suitability tests were conducted for the benefit of the employees and the Claimant's action to impede the same were frivolous, imprudent, ill advised and an abuse of court process. They relied on the sample of suitability tests and results for the years 2019, 2020 and 2021 to urge that the Claimant ought to have waited for the results of the interviews before filing the suit. They also argued that the Claimant's witness (CW1) had benefitted from the interviews whereby he was promoted from a labourer to Revenue Supervisor.
45. It was further submitted that by bringing this suit to stop the suitability tests, the Claimant was inviting the court to interfere with 2<sup>nd</sup> respondent's mandate under section 59 of the County Government Act. Further that stopping the interviews would interfere with 2<sup>nd</sup> respondent's mandate to manage county affairs. For emphasis, reliance was placed on the case of *Daniel Owino Aol v Secretary, Kisumu County Public Service Board & 2 others* [2017] eKLR where the court declined to permanently restrain the respondents from fulfilling their statutory mandate.
46. It was further submitted that, granting the orders sought the court will violate the principle of separation of powers. The respondents relied on the case of *County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* [2015] eKLR where the Court emphasized the



essence of doctrine of separation of powers by holding that it is not permissible for any of the three arms of government to interfere with the others' sphere.

47. They further cited the case of *Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 others* [2014] eKLR where it was held that a court of law should not interfere with internal disciplinary process save for exceptional circumstances. Therefore, the Court was urged to dismiss the suit since the interviews were conducted within the respondents' mandate, and neither *the constitution* nor the labour laws had been violated.
48. As regards the allegation that the suitability interviews amounted to discrimination, the Respondents submitted in the negative and urged the court to be guided by the definition of discrimination by the Supreme Court of India in *Kedar Nath v State of WB* (1953) SCR 835 (843) and adopted by the Supreme Court of Kenya in the *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12(KLR). They argued that the claim on discrimination was baseless since the exercise followed a request by nine former employees of the defunct local authorities.
49. They reiterated that they decided to conduct the interviews in the spirit of inclusivity and not to limit to the nine employees who had written to the county government. They maintained that the purpose of the interviews was to assist the 2<sup>nd</sup> respondent in identifying employees who are suitable for promotion and salary increment. They further argued that section 138 of the County Government Act appreciates the categories of the county employees with corresponding rights.
50. The section also provides the County Public service Boards with guidelines on how to deal with employees of the defunct local authorities. They contended that the said categorization of county employees did not amount to discrimination. Finally, they submitted that the impugned suitability test is not discriminatory but in accordance with the law.

### **Issues For Determination And Analysis**

51. I have considered the pleadings, evidence and submissions by counsel. It is not in dispute that the Claimant's members are employees of the Respondents. It is also a fact that the Respondents conducted suitability tests on the said members but the results were withheld in compliance with Court orders. The respondents' mandate to carry out the exercise has not been contested but the claimant maintains that the exercise is unlawful for being done in a discriminatory manner. The issues for determination are as follows:
  - a. Whether the Claimant has locus standi to bring the suit on behalf of its members.
  - b. Whether the Claimant's members were discriminated against through the impugned suitability interviews.
  - c. Whether the suit undermines the principle of separation of powers.
  - d. Whether the Claimant is entitled to the relief sought.

### **Locus Standi To Sue On Behalf Of Its Members**

52. The Respondents questioned the Claimant's standing in bringing this claim on behalf of its members. The claimant did not submit on that objection. However, there is no big deal because the emerging jurisprudence is that a trade union has the right to bring suit on behalf of a member, if only it can show that the person on whose behalf the suit is brought is a member of the union. I gather support from



the case of *Kenya Union of Domestic Hotels Educational Institutions and Hospital Workers v Bai Hong Cheng* [2021] eKLR the Court held as follows:

“It follows therefore that for a trade union to sue on behalf of its member(s) it does not need to have a Recognition Agreement with the employer; the only requirement is that the Grievant be a member of the trade union.”

### **Whether The Claimant’s Members Were Discriminated Upon**

53. Article 1 of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) defines discrimination as follows:

1. “For the purpose of this Convention the term discrimination includes—
  - (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
  - (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative of employers’ and workers’ organizations, where such exist, and with other appropriate bodies.”

54. The Supreme Court also defined discrimination in the case of *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) (Judgment) as follows:

“... where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex, disability etc or due to unfair practice and without any objective and reasonable justification.”

55. The *Employment Act* under section 5 gives effect to Article 27 of *the Constitution* and cautions employers against discrimination in the following terms:-

- “(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.
- (3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—
  - (a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;
  - (b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.”

56. The Claimant in this case contends that the Respondents acted in bad faith and with the sole aim of terminating the employment of its members. Therefore, it urges this Court to quash the directive to subject the claimant’s members to suitability test. The Respondents on the other hand, argue that the impugned exercise is aimed at benefiting its employees in terms of promotion and salary increment.



57. I have perused the letter dated 28<sup>th</sup> March 2022 by the nine employees who sought for promotion and my attention is particularly drawn to the following paragraph: -
- “ There has been attempts to forcefully apply the devolved units scheme of service on us, thus discriminating us based on our previous institutions.”
58. The letter further stated that the authors had for ten years made numerous individual requests to the respondents for promotion under their Collective Bargaining Agreement, CA NO. 14 of 2013, and the schemes of service of the defunct local authorities, but no response was given. Further, in 2018 they made request for salary increment under the CBA after passing the relevant examination, but no response was received.
59. This letter dated 28<sup>th</sup> March, 2022 was forwarded to the Secretary of the 2<sup>nd</sup> respondent vide letter dated 13<sup>th</sup> April 2022. In response the letter dated 30<sup>th</sup> November 2022 was issued directing that all the employees from the defunct local authorities to attend suitability interviews.
60. I have gone through the list of unionized employees and the list in invitation for interviews. It is evident that four out of nine employees who wrote the letter dated 28<sup>th</sup> March 2022 including Grace Akinyi, Catherine Wambui, Susan Kariithi and Mary Mbogo were not invited for the suitability test. No explanation was given for the omission I wonder how the Respondents invited dead and retired members of the union left out the employees who triggered the suitability interviews. The same four persons are also not in the list of the claimant’s members. According to claimant the reason for such differential treatment was that the union members were being victimized due to their union membership.
61. Section 5 (7) of the *Employment Act* provides that where there is an allegation of discrimination, the employer shall bear the burden of proving that the same was not there. The provision states that: -
- “(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.”
62. The Respondents attached previous invitations for suitability tests for other employees for the years 2019-2021 to prove that suitability test is a normal practice in the county. I have carefully considered the suitability test invitation letters dated 27<sup>th</sup> March 2019, 6<sup>th</sup> January, 2020, 22<sup>nd</sup> January 2020 and 1<sup>st</sup> February 2021. I have also considered the corresponding results and observed that unlike in the instant case, the purpose for the suitability interview was clearly indicated in the invitation letter as promotion. The employees were listed according to their job groups and the positions to which the employees were to be promoted were also indicated in the invitation letter. Further, in all the said invitation letters, the Board requested the heads of the sections to provide it with the suitability interview questions and a technical officer to assist.
63. Applying the foregoing facts to the definition of discrimination above, I am convinced that the Claimant’s members were not treated the same as the rest of the employees. The said differential treatment amounts to discrimination contrary to Article 27 of *the Constitution*. I say so because, the former local authorities’ employees were absorbed into the respondent public service ten years ago and they ought to be treated the same as their counterparts who joined the respondents from other places. They should also not be treated differently due to their membership to the claimant union.



64. In view of the foregoing matters, I find that the 2<sup>nd</sup> respondent did not execute its statutory mandate fairly and lawfully by inviting and conducting the suitability interviews for claimant's members in a manner different from the other employees of the same county public service. The said conduct also amounts to violation of the right to fair labour practices and the right to fair administrative action. It is further against Article 10 of *the constitution* which provides that all state organs, state officers, public officers and all persons are bound by the national values whenever they interpret *the Constitution*; make, apply or interpret, any law; or make or implement public policy decisions. Article 10(2) then lists the national values thus: -
- a. "patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
  - b. human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
  - c. good governance, integrity, transparency and accountability;
  - d. sustainable development."
65. The impugned suitability interview is also contrary Article 232 (1) of *the constitution* which sets out the values and principles of public service including the following:
- (e) accountability for administrative acts;
  - (f) transparency and provision to the public of timely, accurate information
  - (g) subject to (h) and (i), fair competition and merit as the basis of appointments and promotions;"

**Whether the suit undermines the principle of separation of powers.**

66. The Respondents argued that the Claimant has invited this Court to interfere with the doctrine of separation of powers as they will be curtailed from performing their mandate. I do not agree with those sentiments as this Court is clothed with the duty to exercise checks and balances on the other arms of government, and also to protect *the Constitution* and ensure that justice is done for all irrespective of status.
67. I gather support from the case of Commission for the Implementation of *the Constitution* vs. National Assembly of Kenya, Senate & 2 Others [2013] eKLR where it was opined that:
- "The system of checks and balances that prevents autocracy, restrains institutional excesses and prevents abuse of power apply equally to the Executive, the Legislature and the Judiciary. No one arm of Government is infallible, and all are equally vulnerable to the dangers of acting ultra vires *the Constitution*."
68. In addition to the foregoing matters, the emerging jurisprudence is that the court has jurisdiction to intervene in internal process if the employer has adopted a procedure that is unfair and contrary to the law, contract of employment or public policy. The said intervention is necessary not to stop the process altogether, but to put the process in the right track, and also to balance the bargaining power between the employer and the employee.



## Whether The Claimant Is Entitled To The Relief Sought

69. In view of the matters highlighted above namely discrimination of the claimant's members, unfair labour practices and lack of clear motive for the suitability interview. I find that the claimant is entitled to declaration that its members have been treated unfairly, unlawfully and contrary to *the constitution* by the respondents. It is also entitled to declaration that its members are entitled to the same treatment and terms of employment as the other employees of the respondents in their category. In view of the foregoing, the claimant is also entitled to declaration that its members' right and fundamental freedoms under Article 41 and 47 of *the Constitution* have been violated by the respondents.
70. In addition, the claimant is entitled to declaration that the letter dated 30<sup>th</sup> November, 2022 is irregular and unlawful in so far as it relates to the claimant's members. Consequently, I hereby quash the letter dated 30<sup>th</sup> November, 2022 and the suitability test administered on the claimant's members pursuant to the letter.

## Conclusion

71. I have found that the suitability interviews of the claimant's members done pursuant to the letter dated 30<sup>th</sup> November, 2022 are different from those previously done by other employees. The invitation letters in the previous interviews expressly indicated the purpose of the interview, and the position to be promoted to. The letters further expressly requested the heads of the department for the interview questions and a technical person to help in the interviews. The purpose for the instant interviews was not expressly communicated even after inquiry from the claimant union. Likewise, the procedure to be followed and the measurement criteria used in the interview remains mysterious to date.
72. I have further found that the respondent did not spare the dead and retired employees of the union but conspicuously left out four employees of the defunct local authorities who were among the nine employees who wrote a request for promotion and pay rise. The four are not members of the claimant union. It is on the basis of the foregoing matters that I have reached the finding that the claimant's suit is not frivolous. It raises genuine concerns which could have been sorted out amicably when the claimant sought clarification by the letter dated 8<sup>th</sup> December, 2022. In the end, I enter judgment for the claimants in the following terms: -
- i. A Declaration that the Respondents' treatment of the Claimant's members is and was unfair, unlawful and contrary to *the Constitution* and the *Employment Act* on rights to fair labour practices.
  - ii. A declaration that the Claimant's members are entitled to the same treatment and terms of employment as employees in the same category and their counterparts employed by the devolved governments.
  - iii. A declaration that the Claimant's members' fundamental rights and freedoms under Article 41 and 47 of *the Constitution* have been violated by the Respondents.
  - iv. A declaration that the letter dated 30<sup>th</sup> November 2022 in relation to the Claimant's members is irregular, unlawful and contrary to the law.
  - v. An order do issue quashing the letter dated 30<sup>th</sup> November 2022 as well as the decisions contained in the letter dated 30<sup>th</sup> November 2022 and the suitability tests concluded by the Respondents, its agents, officers or persons acting under their instructions.
  - vi. The claimant is awarded costs of the suit to be agreed upon or taxed.



73. Finally, I wish to clarify that the respondents are at liberty to conduct suitability interviews on claimant's members, provided that it is done within the four corners of the law.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF OCTOBER 2023.**

**ONESMUS N MAKAU**

**JUDGE**

**ORDER**

This judgment has been delivered to the parties via Teams video conferencing with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N. MAKAU**

**JUDGE**

