



**Agoro v Mwangi & 4 others (Petition E211 of 2022)
[2023] KEELRC 2487 (KLR) (17 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2487 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E211 OF 2022
B ONGAYA, J
OCTOBER 17, 2023**

BETWEEN

PETER ODHIAMBO AGORO PETITIONER

AND

STEPHEN GATHUITA MWANGI 1ST RESPONDENT

COUNTY GOVERNMENT OF NAIROBI 2ND RESPONDENT

NAIROBI COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

THE SPEAKER, NAIROBI COUNTY 4TH RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION 5TH RESPONDENT

JUDGMENT

1. The petitioner filed the petition on 08.12.2022 through M/S Onwong'a Nyakeriga & Company Advocates. The petitioner prayed for orders:
 - a. That a declaration be and is hereby issued that the 1st respondent committed or violated ethics and integrity laws, hence violating articles 10,22, 232, 258 and Chapter 6 of the *Constitution of Kenya* 2010, the *Anti-corruption and Economic Crimes Act* and, the *Ethics and Anti-corruption Commission Act*.
 - b. A declaration that the nomination or application of Stephen Gathuita Mwangi as the Nairobi County Executive Committee (CEC) for Built, Environment & Urban Planning is unconstitutional therefore null and void ab initio.
 - c. A declaration that the appointment of Stephen Gathuita Mwangi as the Nairobi County Executive Committee (CEC) for Built, Environment & Urban Planning by the County Assembly the vetting on the 06.12.2022 is unconstitutional therefore null and void ab initio.



- d. A declaration be and is hereby issued that the actions of the 1st, 2nd and 3rd respondents their representatives or assigns contravenes the *Constitution of Kenya, County Government Act*, 2012, *Employment Act* 2007, *Leadership and Integrity Act*, 2012 and therefore prohibited by law.
 - e. A declaration that Stephen Gathuita Mwangi is not fit to hold any public office as his actions are contrary to the provisions of Chapter 6 of the *Kenyan Constitution*.
 - f. To suspend gazettelement and appointment of Stephen Gathuita Mwangi.
 - g. That the respondents to pay costs of the petition.
 - h. Any other relief that the court may deem just to grant.
2. The petition was based upon the petitioner's supporting affidavit and exhibits thereto filed together with the petition. The petitioner's case is alleged as follows:
- a. He is a patriotic Kenyan citizen and a Member of Women Collective Kenya. He is duty bound by the Constitution of Kenya and other applicable laws governing the conduct of public officers and performance of public functions.
 - b. That on or about 26.10.2022 the Governor of Nairobi county nominated officers of the county executive committee. Among them was the 1st respondent.
 - c. That the 1st respondent previously served as the licensed land surveyor in the defunct City Council of Nairobi and as the County Chief Officer, Land, in the Nairobi county. That when he was the only licensed surveyor of the defunct Nairobi City Council, he irregularly facilitated the transfer or aided in transfer of public properties resulting in pending cases, amongst them being Nairobi Anti-corruption and Economic Crimes Court Petition No. 34 of 2019.
 - d. That the Nairobi County Assembly was informed by a concerned Kenyan about the integrity issues of the 1st respondent vide an objection received on 16.11.2022.
 - e. That during his tenure as County Chief Officer, Lands. in the Nairobi city council, the 1st respondent participated in the irregular allocation of land reference number Nairobi/Block 103/793 to Johnson Nyaga Kibira. That the 1st respondent did not follow the due process in issuance of the title deed and used fraudulent allotment letter, PDPs and lease agreement to process the certificate of lease.
 - f. That he colluded with Cecilia Wangari and the director survey and geographical information system at the lands sub-sector Nairobi city county to come up with survey works to amend the registry index map.
 - g. That Johnson Nyaga sold the property aforesaid to Isaack Abdullahi for the sum of Kshs. 42,500,000/=, and that the 1st respondent together with other parties benefitted from the proceeds of the sale. That the 1st respondent received Kshs 10,350,000/= through the firm of J.K.Mwangi & Company Advocates through his first community bank account, held at Wabera Street Branch.
 - h. That the 1st respondent irregularly transferred other properties, namely:
 - i. Riruta satellite Nairobi county houses to private entities.
 - ii. Ridgeways Nairobi county parcel of land to a private nursery school.
 - iii. Nairobi county land at Highridge to a private clinic and nursery school.



- iv. LR number 209/20664 to one MS Lotega Enterprises Company Limited.
3. The 1st, 2nd and 3rd respondents by grounds of opposition dated 13.12.2022 opposed the petition and the application filed together with the petition and upon the following grounds:
- a. That the application as drawn and filed is fatally defective, incompetent and does not lie in law.
 - b. That the grounds disclosed and laws invoked in the application and the supporting affidavit are absolutely misconceived and cannot justify this court to grant the orders sought.
 - c. That the grounds set out in the application are otherwise an abuse of the court process.
 - d. That the orders sought in the application dated 07.12.2022 have been overtaken by events by virtue of the judgment entered in ELRC Petition No. E184 of 2022, *The association of Muslim Lawyers v The Governor, County Government of Nairobi and 2 others.*
 - e. That the application is a non-starter having failed to invoke the doctrine of exhaustion – having failed the internal appeal mechanism.
4. Further the 1st respondent filed a replying affidavit sworn on 30.01.2023, and stated as follows:
- a. The Court heard and determined ELRC Petition E184 of 2022 and delivered its judgment on 30.11.2022 wherein it gave the process a clean bill of health and allowed the process to proceed leading to the swearing in of all the nominees.
 - b. That for the position of cabinet secretaries nominees who had been nominated by H.E the President of the Republic of Kenya, there were nominees who actually had cases in court and who also had several allegations as against them based on Chapter Six of the *Constitution of Kenya*, but indeed the National Assembly in dismissing such claims upheld the constitutional doctrine that everyone remains innocent unless proven otherwise in an impartial, fair process and forum.
 - c. That unless there is a conviction, allegations or even proceedings in Court alone, cannot be a justification to declare that one falls short of Chapter Six of the *Constitution* or any acts emanating therefrom.
 - d. That the petition as was filed did not met the requisite threshold by failing to set out with reasonable degree of precision of that which he complains, the provisions to be infringed or that have been infringed and the manner in which they are alleged to be infringes.
 - e. That the petitioner has no right to interfere with the Assembly’s legislative process.
 - f. That he has never participated in irregular allocation or transfer of land during his tenure as County Chief Officer, Lands in the Nairobi city council, and has never received a bribe nor solicited for any.
5. The 4th respondent filed the replying affidavit sworn on 20.02.2023 by Kennedy O. Ng’ondi, the Speaker of Nairobi City County Assembly and filed through Savai Flora Advocates. It was stated and urged as follows:
- a. The 4th respondent denied knowledge of or the outcome of the events alleged to have taken place during the tenure of the 1st respondent. It was argued that the petitioner has not provided conclusive proof of integrity issues in support of the allegations.



- b. That Nairobi Anti-corruption and Economic Crimes Petition No. 34 of 2019 is yet to be determined conclusively and the legal principle of innocent until the contrary is proven enshrined in article 50(2)(a) applies.
 - c. That the petitioner has failed to demonstrate how the vetting of the 1st respondent by the County Assembly was unconstitutional as the same is not supported by evidence.
 - d. That the petitioner failed to clearly demonstrate grounds disqualifying the 1st respondent from assuming office and to demonstrate how he failed to satisfy moral and ethical requirements prescribed by the constitution and other laws referred to.
6. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
 7. To answer the 1st issue, the Court finds that the petitioner has met the threshold for pleading alleged constitutional violations. The petitioner has in detail set out in the petition the particulars of the facts supporting the case and has specifically pleaded the provisions of the Constitution that he alleges to have been violated. The provisions invoked are as well set out in the prayers. The factual allegations are said to be the 1st respondent's actions or omissions while he served in stated public office. The petitioner has as well specifically pleaded the constitutional and statutory provisions that he alleges to have been violated or breached. The Court returns that the petition meets the threshold of a proper constitutional petition alleging violation of rights and freedoms or other constitutional provisions as envisaged in Articles 22, 23 and 258 of the Constitution.
 8. To answer the 2nd issue, the Court returns that the 1st respondent is protected by the constitutional presumption of innocence until proved guilty as was urged for the respondents. The alleged facts for want of due integrity on the part of the 1st respondent appear to have been subject of investigations and other processes. There appears to be no evidence of a finding of culpability against the 1st respondent reached in a criminal or civil justice process or an administrative or other disciplinary process continued in that regard against the 1st respondent. It therefore appears to the Court that while the allegations in the present petition as levelled against the 1st respondent were brought to the attention of the County Assembly during the vetting process and were known to the 2nd, 3rd and 4th respondent's during the vetting, recruitment, and recommendation for appointment, in absence of a judicial or administrative finding of culpability against the 1st respondent, the constitutional presumption of innocence until proved guilty would operate to vindicate the process leading to the 1st respondent's appointment as urged for the respondents. The Court further considers that the recruitment, vetting and appointment process was not a disciplinary process but the 1st respondent having been appointed, nothing operates as a bar for commencing and continuing such lawful disciplinary processes as may be just and as per prevailing applicable law.
 9. To answer the 3rd issue, the Court returns that the present petition is not barred by reason of the judgment that was rendered in ELRC Petition No. E184 of 2022, The Association of Muslim Lawyers v The Governor, County Government of Nairobi and 2 others. That earlier petition challenged the process used to arrive at the nominees including the petitioner. The present case challenges the 1st respondent's concluded appointment. The cause of action as well as the parties are conspicuously different and the doctrine of res judicata does not emerge to apply at all.
 10. To answer the 4th issue for determination, the Court returns that the petitioner has failed to establish the allegations of violations as alleged against the respondents and the petition will collapse as being not established. Considering all circumstances of the case, each party to bear own costs of the petition.



In conclusion, the petition is hereby dismissed and each party to bear own costs of the proceedings.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
TUESDAY 17TH OCTOBER, 2023.**

BYRAM ONGAYA

PRINCIPAL JUDGE

