



**Barasa v Public Service Board County Government of Trans-Nzoia & 4 others
(Petition 2 of 2022) [2023] KEELRC 3184 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3184 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
PETITION 2 OF 2022
MA ONYANGO, J
NOVEMBER 30, 2023**

**IN THE MATTER OF ARTICLES 10,22,23,27,47,73,162(2)
(A),184, 232 AND 235 OF THE CONSTITUTION OF KENYA**

AND

**IN THE ALLEGED VIOLATION OF SECTION 37 OF THE
NATIONAL EMPLOYMENT AUTHORITY ACT. NO. 3 OF 2016**

AND

**IN THE MATTER OF SECTIONS 55,56,57,58,59,64,65,87
& 97 OF THE COUNTY GOVERNMENTS ACT,2012**

AND

**IN THE MATTER OF SECTIONS 7,10 AND 11 OF THE PUBLIC
APPOINTMENTS (COUNTY ASSEMBLIES APPROVAL) ACT OF 2017**

AND

**IN THE MATTER OF ADVERTISEMENT FOR
PUBLIC SERVICE BOARD TRANS-NZOIA COUNTY**

AND

**IN THE MATTER OF APPOINTMENT AS A MEMBER
OF PUBLIC SERVICE BOARD TRANS-NZOIA COUNTY**

BETWEEN

SILAS W. BARASA PETITIONER

AND

**PUBLIC SERVICE BOARD COUNTY GOVERNMENT OF TRANS-
NZOIA 1ST RESPONDENT**



**SECRETARY, COUNTY GOVERNMENT OF TRANS-NZOIA 2ND
RESPONDENT**

ALBERT SOITA 3RD RESPONDENT

THE COUNTY GOVERNMENT OF TRANS-NZOIA 4TH RESPONDENT

THE COUNTY ASSEMBLY OF TRANS-NZOIA 5TH RESPONDENT

JUDGMENT

1. The Petitioner herein is a Kenyan citizen and a resident of Trans-Nzoia County. The 1st, 2nd, 3rd, 4th and 5th Respondents are established under Article 235 of the Constitution as well as Section 57 of the County Government Act.
2. In the Petition dated 6th December 2022, the Petitioner alleges that the Respondents have breached the following provisions of the law; Articles 10, 22, 23, 27, 47, 73, 162(2)(a), 184, 232, and 235 of the Constitution, section 37 of the National Employment Authority Act, sections 55, 56, 57, 58, 59, 64, 65, 87 and 97 of the County Governments Act, and sections 7, 10 and 11 of the Public Appointments (County Assembly Approval) Act.
3. The Petitioner seeks the following orders against the Respondents:
 - a. A declaration that the 1st Respondent was and is unlawfully and improperly constituted.
 - b. An order of permanent injunction restraining the 1st Respondent from carrying out any functional duties, assigned and/or designed
 - c. An order to disband and reconstitute the Board of Members of 1st Respondent afresh as per the principles and values of the Articles 19, 232 and 235 of the Constitution
 - d. An order for auditing of the County Health employees to establish how many more other personnel were hired than the vacant positions advertised
 - e. An order for auditing of the County Health employees to establish how many more employees were hired through nepotism
 - f. An order for the removal from the work force and payroll of the 4th respondent of all employees whom the audit in (d) and (e) above will reveal were hired unlawfully and irregularly
 - g. A declaration that the list of persons nominated as Chief Officers does not reflect the face of Trans-Nzoia County.
4. The Petition is supported by the Statement of facts by the petitioner herein and filed with the Petition.
5. The Petition is opposed. The firm of Z.K. Yego Law Offices entered appearance vide a memorandum of appearance filed in court on 3rd January 2023. The said firm filed the 1st and 3rd Respondent's response to petition and a notice of preliminary objection both dated 13th February 2023. The 3rd Respondent also filed a replying affidavit sworn by himself on 28th February 2023. There is also a notice of Preliminary Objection dated 12th January 2023 on behalf of the 1st, 2nd, 3rd and 4th Respondents filed by the firm Oringe Waswa & Opany Advocates.



The Petitioner's Case

6. According to the Petitioner, the 1st Respondent as constituted does not meet the values and principles in Article 10, 73(2) and 232 of *the Constitution*.
7. It is also the Petitioner's case that the 3rd Respondent who is the acting secretary of the 1st Respondent did not undergo a competitive process as required by section 58(2) of the *County Governments Act* and has been holding the said position in the acting capacity since 2018.
8. The Petitioner states that the chairman and members of the 1st Respondent were nominated and appointed by the Governor with the approval of the County Assembly without their secretary which is a gross violation of section 58(1)(c) of the County Government Act.
9. The Petitioner further avers that although section 64(1), (2) and (3) of the County Government Act allows one to be appointed a public officer in an acting capacity, such acting appointments are only for a specified period and only during a temporary absence. It is contended that the 3rd Respondent has therefore overstayed in that position beyond what is contemplated by statute and further, that the 3rd Respondent is gainfully employed by the 4th Respondent as the finance officer of the 1st Respondent. It is the Petitioner's case that the 3rd Respondent is serving in two capacities contrary to the provisions of Articles 10, 73(2) and 232 of *the Constitution*.
10. The Petitioner avers that on 12th August 2022 vide print media, the 1st Respondent through the 3rd Respondent advertised for several positions to be filled by the public in the organization of the 4th Respondent which advertised posts, according to the Petitioner were irregularly and unlawfully filled due to the 3rd Respondent's conflict of interest in the two positions in which he is serving.
11. According to the Petitioner, as a result of the above, there was hiring of more personnel than the vacant positions advertised; hiring of family members and close relatives of current employees of the 4th Respondent into the 4th Respondent; and nominating of chief officers who do not reflect the face of the inhabitants of the population that constitutes Trans-Nzoia County.

The 1st and 3rd Respondents' Case

12. In their response to the Petition, the 1st and 3rd Respondents' aver that the 1st Respondent is lawfully constituted in accordance with the provisions of the law and that there exists no conflict of interest with the acting Secretary holding a substantive post as Director, Finance of the 1st Respondent.
13. According to the 1st and 3rd Respondents', the appointment of the 3rd Respondent as acting secretary of the 1st Respondent on 24th January 2018 was meant to be for a period of six (6) months only but the chain of events have necessitated the continued appointment of the 3rd Respondent so as to ensure the essential activities of the 1st Respondent do not grind to a halt and that the 1st Respondent is able to discharge its functions.
14. The 1st and 3rd Respondents maintain that the 1st Respondent soon after appointment of the 3rd Respondent in acting capacity advertised for the position of the secretary to the Board in March 2018 and commenced the recruitment process but unfortunately did not get a suitable candidate. It is further averred that the 1st Respondent in March 2019 and 2022 advertised for a second round of the recruitment for the substantive officer holder but the process was halted by the instant petition.



15. It is the 1st and 3rd Respondent's case that the continued tenure of the 3rd Respondent renewed every six months is not out of ill will, improper motive or malicious purport but rather a necessary endeavour to ensure that the operations of the 1st respondent run smoothly and within the stipulated law.
16. According to the 1st and 3rd Respondent, it adhered to section 59(1),(4),(5) and 65(1)(a) of the [County Governments Act](#) in its recruitment process of the medical staff on behalf of the department of health of the 1st Respondent which requested additional staff following staff shortage in the department caused by natural attrition.
17. The 1st and 3rd Respondents therefore aver that the Petitioner's allegations of nepotism in the recruitment process is false and a gross misrepresentation to this court. It is contended that the recruitments conducted by the 1st Respondent have been based on a competitive recruitment process as contemplated by the laws of Kenya. That the allegations of impropriety and breach of law are frivolous, baseless and an abuse of the court process.
18. The 3rd Respondent herein Albert Soita Wanyonyi further swore a Replying Affidavit on 28th February 2023. In the affidavit the 3rd Respondent avers that when the 1st Respondent's former substantive secretary left the organization to pursue other interests, he was a member of the secretariat. That vide a board meeting of the 1st Respondent held on 24th January 2018 he was appointed as the acting secretary to the board a position he has held to date. He states that in March 2022, the 1st Respondent advertised the position of secretary of the 1st Respondent but before the competitive recruitment process was conducted, the process was halted vide court order in Kitale ELRC petition No. E004 of 2022 necessitating his continued service.
19. It the 3rd Respondent's contention that the 4th Respondent's Department of Health requested the respondent for recruitment of 864 health personnel to be spread in two phases and that the technical came up with the list of medical personnel positions that needed to be filled. He avers that vide advertisements on 12th August 2020, the 1st Respondent advertised a total of 338 vacancies to be filled in the first recruitment and that as the 1st Respondent was continuing the recruitment process of the 338 vacancies to be filled in the department, the 4th Respondent vide a letter dated 7th April 2021 requested recruitment of additional staff following shortage of existing staff due to natural attrition.
20. It is the 3rd Respondent's contention that the 1st Respondent held a meeting on 10th June 2021 to consider the request of the department of health and the board revised the initial first phase recruitment from 338 to 356 positions.
21. He stated that Rael Naliaka Soita is not his daughter and thus the allegations of nepotism are false, malicious and misrepresented before the court. He further averred that the county staff being Fredrick Wakofula Sifuna, Emelda Malemo and Dorothy Nabwala Nyukuri are not related to the new recruits Mary Nasimiyu, Lilian Kasandi Ango, Edith Khavero, Amos Wekesa Barasa and Saenyi Eugene as alleged by the Petitioner.
22. He further contended that the recruitment process conducted by the 1st Respondent was competitive and meritorious and the allegations of nepotism or any impropriety by the 1st Respondent are false.
23. The court was therefore urged to dismiss the petition with costs to the 1st and 3rd Respondents.
24. As mentioned earlier, the 1st and 3rd Respondent filed a Notice of preliminary objection dated 13th February 2023 on grounds that:
 - a. This court lacks jurisdiction to hear and determine this suit in view of the provisions of Article 162(2)(a) of [the Constitution](#) and section 12 of the Employment and Labour Relations, 2011;



- b. The petition is incurably defective as the Petitioner has not cited specific provisions of *the constitution* alleged to have been denied, violated and/or contravened. As such the petition does not meet the threshold set out in the case of *Anarita Karimi Njeru v Republic* [1979] eKLR.
 - c. The suit is premature pursuant to section 87 of the *Public Service Commission Act*.
25. On 29th March 2023, the court directed that the issues in the preliminary objection be dealt with in the Petition and for parties to proceed by way of written submissions.

Petitioner's Submissions

26. In the Petitioner's submissions filed in court on 26th September 2023, the issues that were identified for determinations are:
- a. Whether this court lacks jurisdiction;
 - b. Whether the Petition has met the threshold of a constitutional Petition;
 - c. Whether the process of recruitment was properly conducted in accordance with the law;
 - d. Whether the 1st Respondent is lawfully and properly constituted in accordance with the law.
27. On the first issue, the Petitioner submitted that the jurisdiction of the court is proper. It was submitted that this court has unlimited jurisdiction and appellate jurisdiction in employment and labour dispute and constitutional petitions pursuant to Article 162(2) of *the Constitution*.
28. On the issue whether this Petition meets the threshold of a constitutional petition, it was submitted that the instant petition raises substantial issues on violation of principles and values set out under Articles 10, 73, 232 and 235 of *the constitution*. It is further submitted that the petitioner has pleaded and set out with a degree of precision the rights that have been infringed and the manner in which they have been infringed therefore satisfying the threshold in *Anarita Karimi* case. In support of this position, the Petitioner quoted Articles 10, 22, 73(2) and 258 of *the Constitution* to illustrate how national values and principles of governance were not implemented when making appointments of the Respondents. It was also submitted that although section 64(1)(2) and (3) of the *County Governments Act* allows a person to be appointed to public office temporarily in acting capacity, the 3rd Respondent has been holding that position for a long time and that he is also employed as the Finance Director of the 1st Respondent thus serving in two positions.
29. On the third issue as to whether the recruitment process was properly conducted in accordance with the law, it was the Petitioner's submission that the recruitment process was instigated with nepotism, tribalism and discrimination as outlined in the Petition. According to the Petitioner, the 1st Respondent advertised for vacant positions vide a notice dated 12th August 2020 inviting members of the public to make application yet the 1st Respondent was not properly constituted at the time as required by the *County Governments Act*. It was submitted that the Respondents claim that the process was lawful, fair and proper but have not produced any documents to demonstrate and prove the same.
30. It is the Petitioner's further contention that the 1st and 3rd Respondent did not adhere to provisions of the law in its recruitment process. It was stated that the number of applicants hired for the jobs advertised were more than that of the number of vacant positions advertised because some vacant positions were given to either family members or close relatives of the current employees of the 4th Respondent. According to the Petitioner, the process of recruitment did not reflect the principles set out under Article 10 of *the Constitution*.



31. Lastly, as to whether the 1st Respondent is lawfully and properly constituted in accordance with the law, the Petitioner submitted that the appointments were not done in accordance with the frameworks and standards prescribed by an Act of parliament as stipulated by Article 235 of *the Constitution*.

The 1st and 3rd Respondents' Submissions

32. The 1st and 3rd Respondent in their submissions filed in court on 16th August 2023 framed the issues for determination to be:
- a. Whether this court has jurisdiction to determine this matter;
 - b. Whether the Petition raises any issues on violation of *the Constitution* to meet the threshold of a Constitutional Petition;
 - c. Whether the continuous holding of office by the 3rd Respondent in the acting position is legal;
 - d. Whether the recruitment process was conducted in accordance with the law.
33. On whether this court has jurisdiction to determine this matter, the 1st and 3rd Respondents submitted that this court has no jurisdiction. It was their submission that the Petitioner did not explore the appeal process mandated by section 87 of the *Public Service Commission Act* before instituting the Petition consequently rendering it premature and fatally defective.
34. It was submitted that as a result of the Petitioner's failure to explore the laid-out appeal process before instituting the petition, this court lacks jurisdiction to determine this matter.
35. On the issue whether the Petition herein raises any issues on violation of *the Constitution* to meet the threshold of a Constitutional Petition, it was submitted that the instant petition is incurably defective as the Petitioner has not cited specific provisions of *the Constitution* alleged to have been denied, violated or contravened. According to the 1st and 3rd Respondents, the Petitioner has not demonstrated in his Petition the injury likely to be caused to him and neither has he demonstrated how the 1st and 3rd Respondents violated his Constitutional rights. In support, the case of Centre for Human Rights and Mediation v County Government of Uasin Gishu & another; Commission on Revenue Allocation & another [2019] eKLR was cited.
36. On the third issue, the 1st and 3rd Respondents submitted that it is lawfully constituted in accordance with the provisions of the law particularly Article 235(1)(b) of *the Constitution*, sections 2,57,58 and 64 of the *County Governments Act* and that there exists no conflict of interest with the acting secretary holding a substantive position as Director, Finance of the 1st Respondents.
37. It is submitted that the 3rd Respondent's appointment as acting secretary was legitimate and based on the provisions of the law and that as such the continued tenure of the 3rd Respondent renewed every six months is not out of ill will, improper motive or malicious purport but rather a necessary endeavour to ensure that the operations of the 1st Respondent are critical in the discharge of the mandate bestowed upon the 4th Respondent.
38. As to whether the recruitment process was conducted in accordance with the law, the 1st and 3rd Respondent submitted that no more personnel were hired than the number of vacant positions advertised and no nepotistic appointments were made.
39. It is submitted that the 1st and 3rd Respondents adhered to section 59(1), (4) and (5) and 65(1) (a) of the *County Governments Act* in its recruitment process of the medical staff on behalf of the Department of Health of the 1st Respondent which requested additional staff following staff shortage



in the department caused by natural attrition. It was thus submitted that the petitioner's allegations of nepotism in the recruitment process is false and a gross misrepresentation to this court.

40. According to the 1st and 3rd Respondents, the recruitments conducted by the 1st Respondent have been based on a competitive recruitment process as contemplated by the laws of Kenya.
41. It was submitted that the claim that chief officers were appointed without reflecting the diversity of Trans-Nzoia County's population is misleading and that the appointments were made with due regard to the principles of inclusivity, equality and the best interests of the County.
42. It is submitted that the Petitioner's petition lacks merit and is grossly misconceived.
43. The court was thus urged to dismiss the Petition

The 2nd and 4th Respondent's Submissions

44. The issue for determination according to the 2nd and 4th Respondent is whether the petition is merited.
45. According Counsel for the 2nd and 4th Respondents, the Petitioner's sole aim is to crumble the entire government structure. It is submitted that the 1st Respondent is the agent of the 4th Respondent and whatever decision the court makes touching on this matter has the effect of crumbling the entire system of the County Government of Trans –Nzoia.
46. It is further submitted that the Petition as couched does not disclose any specific violation of *the constitution* and therefore the Petitioner has failed to satisfy the principles laid out in the Anarita Karimi case.
47. It is also submitted that some of the issues raised in the petition have been overtaken by events and therefore the same have been predated on a vacuum. It is further submitted that some of the alleged issues took place during the first regime and that this is a new government still at its infancy, still restructuring, organizing and reorganizing itself for better service delivery for the benefit of the people of Trans-nzoia.
48. In response to the allegation of nepotism in the recruitment process by the 3rd Respondent, it is submitted that it is not true that a single member of the 1st Respondent in acting capacity can influence the decision of the board to make a decision of the board to recruit anybody and thus the allegation lacks basis. It is submitted that the decisions of the board are decided on the majority basis. The case in Kisumu County Public Service Board & Another v Samuel Okuro & 7 others [2018] eKLR was cited.
49. The 2nd and 4th Respondents also submitted that the Petitioner failed to exhaust all the existing avenues to address his concerns and decided to jump the gun with malicious intentions. According to the 2nd and 4th Respondents', section 77 of the *County Governments Act* gives the Public Service Commission the mandate under section 87(2) of the Public Service Act to hear appeals on any decision relating to employment of persons in the County Government including the decisions in respect of recruitment, appointments, selection and qualification attached to any office thereof. Reliance was placed on the case of Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & b1756 others
50. Counsel for the 2nd and 4th Respondents also submitted that the Petitioner had failed to provide any documentary evidence to corroborate his allegations of appointing family members and wants this court to terminate employment of citizens who are not even aware of this petition. It was submitted that the Petitioner failed to enjoin as interested parties, the persons allegedly mentioned as family members and close relatives of the 3rd Respondent in which case should the court proceed to give



adverse orders, the mentioned persons will be prejudiced and condemned unheard contrary to the principles of natural justice.

51. It is the 2nd and 4th Respondent's contention that no proof of the ethnicity of the employed persons has been availed to this court and that a mere allegation of ethnicity without substantive evidence to prove the same will not suffice.
52. In the end, the court was urged to dismiss the Petition with costs to the Respondents as the Petitioner has not made out his case.

Determination

53. Upon considering the Petition, the responses thereto as well as the submissions of the respective parties, I find the issues that fall for my determination are;
 - i. Whether the court is seized with jurisdiction to entertain the matter;
 - ii. Whether the instant Petition meets the Constitutional requirement of a Petition
 - iii. Whether the prolonged holding of office by the 3rd Respondent in the acting capacity as the Secretary of the 1st Respondent is proper
 - iv. Whether the Petitioner has made out a case for nepotism by the Respondents in the recruitment process
 - v. What orders should issue?

Whether The Court Is Seized With Jurisdiction To Entertain The Matter

54. In the Preliminary objection dated 13th February 2023 filed by the 1st and 3rd respondents, the jurisdiction of this court has been brought to question.
55. It is evident from the averments in the Petition that the issues raised relate to the recruitment and employment of public servants and in my view, the constitutional issues raised in the Petition are related and incidental to employment and labour relations.
56. The Employment and Labour Relations Court has the constitutional mandate to hear and determine all employment and labour relations disputes as under Article 162(2)(a) of *the Constitution* of Kenya. It therefore follows that this court is clothed with the jurisdiction to handle this Petition.
57. The Petitioner further averred that the petition herein is premature as the Petitioner did not explore the appeal process mandated by section 87 of the *Public Service Commission Act* before instituting the Petition.
58. Section 87 of the *Public Service Commission Act* provides at subsection (2) thereof that a person shall not file any legal proceedings in any court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government public service unless the procedure provided for under this part has been exhausted.
59. The issues raised herein are not decisions of the county public service board as envisaged in section 85 of the Public Service Act. What the petitioner herein complains of is violation of the requirements of appointment of county secretary and *the constitution* of the county public service board which is the role of the governor and approval by the county assembly under sections 44 and 58 of the *County Governments Act*.



60. I find the petition as filed before this court to be competent and within the jurisdiction of the court as mandated under article 162 of the constitution and section 12 of the Employment and Labour Relations Court Act.

Whether The Instant Petition Meets The Constitutional Requirement Of A Petition.

61. The Petitioner filed the instant Petition alleging that the Respondents breached Articles 10, 22, 23, 27, 47, 73, 162(2)(a), 184, 232 and 235 of the Constitution in the recruitment process and also through the continued retention of the 3rd Respondent as the acting secretary of the 1st Respondent. In my view, these issues stand out and are clear in the Petition. I therefore find that the Petition passes the standard set out in Anarita Karimi's case.
62. The averment by the Respondents that the Petitioner has not demonstrated in his Petition the injury likely to be caused to him or how the 1st and 3rd Respondents violated his Constitutional rights fly in the face of the provisions of Articles 3, 19, 22 and 258 of the Constitution which place the obligation to respect, uphold and defend the constitution on every person without distinction. Indeed in all public interest litigation under the Constitution of Kenya 2010 all that a petitioner has to prove is that there has been a violation or threatened violation of the constitution or any part thereof to acquire locus.

Whether The Prolonged Holding Of Office By The 3rd Respondent In The Acting Capacity As The Secretary Of The 1st Respondent Is Proper

63. The law on appointment of a public officer in an acting capacity is contained in Section 34(1) of the Public Service Commission Act which provides that acting appointments shall be-
- (a) made by the lawful appointing authority; and
 - (b) subject to the prescribed regulations and procedures which apply to appointments.
- The Act further provides under 34(2) and (3) as follows: -
- (2) A person shall not be appointed to hold a public office in an acting capacity unless the person satisfies all the prescribed qualifications for holding the public office.
 - (3) An officer may be appointed in an acting capacity for a period of at least thirty days but not exceeding a period of six months.
 - (4) A public officer may be assigned to perform duties vested in another public officer during a temporary absence of the other public officer.
 - (5) An acting appointment under subsection (4) shall-
 - (a) be in favour of a public officer who is duly qualified and competent to perform the duty; and
 - (b) not undermine the expeditious appointment or deployment of a competent person to the public office concerned.
 - (6) The Commission shall, whenever it comes to its attention that an authorised officer has purportedly made an acting appointment or assignment, in contravention of the provisions of this section, take corrective action.
64. In the instant case it is common ground that the 3rd Respondent has been holding the position of secretary of the 1st Respondent for more than four years. The 1st and 3rd Respondents submitted



that they advertised the position of secretary to the board in March 2018 but there were no suitable candidate. That the position was again advertised in 2019 but was stopped by the court in Kitale ELRC Petition No. E004 of 2022.

65. In the first place, no evidence was adduced that there was any advertisement for the position of Secretary public Service Board of the Trans-Nzoia County in 2018 and 2019. Secondly, there is no proof that the court stopped the recruitment in Petition E004. Finally, even if there was advertisement and a court order stopping the recruitment, such order would not stop the 1st and 3rd Respondents from appointing a different person other than the 3rd Respondent to hold the position. There is absolutely no valid reason for keeping the 3rd Respondent in acting capacity as county secretary for the period that he has been holding the position.
66. I find that all the Respondents are in violation of the clear and unequivocal provisions of section 34 of the Public Service Act and in retaining the 3rd Respondent in the position of acting county secretary of the county of Trans Nzoia.

Whether The Petitioner Has Made Out A Case For Nepotism By The Respondents In The Recruitment Process

67. The Petitioner has alleged that the recruitment process was instigated marred by nepotism, tribalism and discrimination. However, no evidence has been tabled before court to prove the specific allegations that the Respondents appointed their relatives to the positions which were advertised. In the absence of evidence, averments cannot be relied upon by the court to found the remedies sought by the Petitioner.
68. The Court further notes that the persons alleged to have been irregularly appointed were not joined as parties in this petition. It is a cardinal rule of fair administration of justice that a per
69. on shall not be condemned unheard. The prayers in respect of persons alleged to have been irregularly recruited are therefore not capable of being granted even if the court would have found that their recruitment was irregular.

Whether Orders Sought Should Issue?

70. The Petitioner prayed for a declaration that the 1st Respondent is unlawfully and improperly constituted. The composition of the 1st Respondent is provided for in section 58 of the County Government Act as follows:
 - (1) The County Public Service Board shall comprise—
 - a. a chairperson nominated and appointed by the county governor with the approval of the county assembly;
 - b. not less than three but not more than five other members nominated and appointed by the county governor, with the approval of the county assembly; and
 - c. a certified public secretary of good professional standing nominated and appointed by the governor, with the approval of the county assembly, who shall be the secretary to the board.
71. From the above composition, the County Secretary is not a member of the Board and decisions taken by the board are not affected by the fact that the county Secretary is not properly in office.
72. Further, in this case there was a county secretary in office. The Public Service Act does not provide that a person who acts in a position does not have capacity merely because they are in office irregularly.



73. Section 53 of the *Interpretation and General Provisions Act* provides that:
- Powers of board, etc., not affected by vacancy, etc. Where by or under a written law a board, commission, committee or similar body, whether corporate or unincorporate, is established, then, unless a contrary intention appears, the powers of the board, commission, committee or similar body shall not be affected by –
- (a) a vacancy in the membership thereof; or
 - (b) a defect afterwards discovered in the appointment or qualification of a person purporting to be a member thereof.
74. It is clear from the foregoing that the defect in the holder of the position of county secretary did not affect the decisions and actions taken by the board. The prayer by the Petitioner under this head is thus not warranted and is declined.
75. The Petitioner further prayed for an order of permanent injunction restraining the 1st Respondent from carrying out any functional duties, assigned and/or designed. In view of the findings in paragraph 74 and 75 above, the prayers under this head must also fail.
76. The Petitioner further prayed for an order to disband and reconstitute the Board of Members of 1st Respondent afresh as per the principles and values of the Articles 19,232 and 235 of *the Constitution*. This prayer must also fail in view of the holding in paragraph 74 above.
77. The Petitioner prayed for an order for auditing of the County Health employees to establish how many more other personnel were hired than the vacant positions advertised; an order for auditing of the County Health employees to establish how many more employees were hired through nepotism; and, an order for the removal from the work force and payroll of the 4th respondent of all employees whom the audit in (d) and (e) above will reveal were hired unlawfully and irregularly.
78. The petitioner having failed to prove that the appointment of the county health workers was irregular, these orders are not warranted. The same are declined.
79. The Petitioner also prayed for a declaration that the list of persons nominated as Chief Officers does not reflect the face of Trans-Nzoia County. No evidence was adduced in respect of this prayer. The same is dismissed for want of proof.
80. The only prayer that has been proved by the Petitioner is that the continued appointment of the 3rd Respondent as the acting secretary of the 1st Respondent is against the express provisions of section 34 of the *Public Service Commission Act*, a declaration be and is hereby made that the 3rd Respondent is irregularly in office.
81. As provided under section 34(6) of the *Public Service Commission Act* and in view of the indication by the Respondents that they have been unable to fill the position, the Public Service Commission is hereby directed to immediately send a suitable officer to fill the position of County Secretary Trans Nzoia County in acting capacity and take steps in conjunction with the Respondents to substantively fill the position within the next 6 months.
82. The Public Service Commission is further directed to take any other remedial measures to ensure compliance by the Respondents, including surcharging any officer found to have expended public funds irregularly.
83. The case will be fixed for mention in 6 months to confirm compliance.



84. Any prayer not granted is declined.

85. The 3rd Respondent will personally bear the costs of the Petitioner.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 30TH DAY OF NOVEMBER, 2023.

M. ONYANGO

JUDGE

