



**Nyamwaro v Board of Directors, Kisii Teaching and Referral Hospital & 2 others
(Petition E025 of 2023) [2023] KEELRC 3038 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3038 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E025 OF 2023**

S RADIDO, J

NOVEMBER 29, 2023

**IN THE MATTER OF THE ENFORCEMENT OF
ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 162(2((A), 258**

AND 259(1) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

**IN THE MATTER OF ALLEGED VIOLATION AND
INFRINGEMENT OF THE RIGHTS AND FREEDOMS**

IN ARTICLES 25, 27, 28, 33, 35, 41, 47, 48 AND 5 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF ALLEGED VIOLATION AND INFRINEMENT
OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012**

AND

**IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT
OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

AND1

IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT, 2012

BETWEEN

BENARD NYAMWARO PETITIONER

AND

**BOARD OF DIRECTORS, KISII TEACHING AND REFERAL
HOSPITAL 1ST RESPONDENT**

KISII TEACHING AND REFERAL HOSPITAL 2ND RESPONDENT

COUNTY PUBLIC SERVICE BOARD, KISII 3RD RESPONDENT



JUDGMENT

1. On 11 September 2023, Benard Nyamwaro (the Petitioner) moved the Court alleging that the Board of Directors, Kisii Teaching & Referral Hospital (the Board) had usurped the mandate of the County Public Service Board, Kisii (the Service Board) by purporting to advertise for the position of Chief Executive Officer of the Kisii Teaching & Referral Hospital (the hospital).
2. The Petitioner sought orders:
 - (a) A declaration that the 1st Respondent does not have powers to appoint the Chief Executive Officer for the 2nd Respondent and that in so far as all persons in the employment of the 2nd Respondent draw their salaries from the payroll of the Kisii County Government, then the 3rd Respondent is the body with both a constitutional and statutory mandate to recruit personnel for the 2nd Respondent.
 - (b) A declaration that the actions of the 1st Respondent of seeking to recruit a Chief Executive Officer for the 2nd Respondent is ultra vires, null and void and breaches Articles 2, 3, 10, 27, 28, 41, 47, 55 and 201 of *the Constitution* as read with sections 59 and 60 of the County Government Act.
 - (c) Costs of the Petition be provided for.
3. The Court issued directions on 3 October 2023, and the Respondents filed a replying affidavit sworn by the Chair of the Board and Grounds of Opposition on 16 October 2023. The Chair also filed an affidavit in reply to the Petition on 26 October 2023.
4. For unexplained reasons, none of the parties filed submissions (the Petitioner should have filed and served his submissions by 3 November 2023).
5. The Court has considered the Petition, Motion, affidavits and the Grounds of Opposition.
6. It is not in dispute that the Board advertised for the position of the Chief Executive Officer of the hospital on 10 July 2023.
7. The recruitment went on and the Governor of Kisii appointed one Dr Douglas Oimeke Mariita as the Chief Executive Officer on 29 August 2023.
8. The Petitioner contended that the appointment of Chief Executive Officer was unlawful because the function of recruitment was reserved to the Service Board.
9. The Respondents, however, asserted that the hospital was a semi-autonomous entity of the County Government established and governed by the Kisii Teaching & Referral Hospital Act, 2014 and that section 11 of the Act guided the recruitment and appointment process.
10. The Court has looked at the Act. It provides for the establishment of the hospital, its powers and governance.
11. Section 11 of the Act reserves the power to recruit the Chief Executive Officer of the hospital to the Board with the ultimate appointment power given to the Governor.
12. Unless the Act is found unconstitutional, the Court cannot and is unable to find that the Board usurped the mandate of the Service Board.



Conclusion and Orders

13. The Court finds the Petition herein was devoid of any legal foundation whatsoever and it is dismissed with costs to the Respondents.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 29TH DAY OF NOVEMBER, 2023.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioner N.E. Mogusu & Associates

For Respondents Office of the County Attorney

Court Assistant Chrispo Aura

