



**Hussein v County Public Service Board, County Government of  
Mandera & 2 others; Maalim & 2 others (Interested Parties) (Petition  
E165 of 2023) [2023] KEELRC 3388 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3388 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E165 OF 2023  
B ONGAYA, J  
DECEMBER 20, 2023**

**IN THE MATTER OF THE ALLEGED VIOLATION OF ARTICLES 2(1) AND  
(2), 3(1), 10(1) AND (2)(C), 19, 20(1) AND (2), 21(1), 22, 23, 27(1) AND (2),  
41(1), 47, 73, 232, 258 AND 259(1) OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF SECTIONS 4(1) AND 5(1) OF THE  
FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015**

**IN THE MATTER OF SECTIONS 5(1) AND (2), 8(2), 9, 10(1) AND 10(3) OF  
THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT NO. 1A OF 2015**

**IN THE MATTER OF SECTIONS 63,65,66,68A(1) AND 68A (4)(B)  
AND (C) OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012**

**IN THE MATTER OF THE MANDERA COUNTY GOVERNMENT MANUAL  
DATED AUGUST 2018 CLAUSES 1.22.0, 3.0.2, 3.0.3(3), 3.0.4(4), 3.0.6 AND 3.0.8**

**IN THE MATTER OF APPOINTMENT OF SAMIHA ADAN MAALIM AS  
ASSISTANT DIRECTOR, LIAISON; ABDIMALIK HASSANUR ALI AS  
DEPUTY DIRECTOR LIAISON; AND AHMED SALAH ABDI AS DEPUTY  
DIRECTOR ADMINISTRATION, COUNTY GOVERNMENT OF MANDERA**

**-BETWEEN-**

**SADAM MAALIM HUSSEIN PETITIONER**

**- VERSUS -**

**THE COUNTY PUBLIC SERVICE BOARD, COUNTY  
GOVERNMENT OF MANDERA 1ST RESPONDENT**

**THE COUNTY GOVERNMENT  
OF MANDERA 2ND RESPONDENT**

**THE GOVERNOR, COUNTY  
GOVERNMENT OF MANDERA 3RD RESPONDENT**



**-AND-**

**SAMIHA ADAN MAALIM 1ST INTERESTED PARTY  
ABDIMALIK HASSANUR ALI 2ND INTERESTED PARTY  
AHMED SALAH ABDI 3RD INTERESTED PARTY**

**BETWEEN**

**SADAM MAALIM HUSSEIN ..... PETITIONER**

**AND**

**THE COUNTY PUBLIC SERVICE BOARD, COUNTY GOVERNMENT OF  
MANDERA ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF MANDERA ..... 2<sup>ND</sup> RESPONDENT**

**THE GOVERNOR, COUNTY GOVERNMENT OF MANDERA .... 3<sup>RD</sup>  
RESPONDENT**

**AND**

**SAMIHA ADAN MAALIM ..... INTERESTED PARTY**

**ABDIMALIK HASSANUR ALI ..... INTERESTED PARTY**

**AHMED SALAH ABDI ..... INTERESTED PARTY**

### **JUDGMENT**

1. The petitioner filed the petition dated 22.08.2023 through Kusow & Company Advocates. The petitioner prayed for:
  - a. A declaration be issued that under Article 10,73(2), 232(1) of *the Constitution*, section 66 and 68A of the County Government Act and clause 3.0.8 of the Mandera County Government Manual 2018, the respondents are under a duty to advertise all vacant positions within the Mandera county public service and to appoint persons to the said positions on the basis of fair competition and merit, having regard to competence suitability, experience, qualities and ability.
  - b. A declaration be issued that the respondent's failure and omission to advertise the positions of Assistant Director Liaison, Deputy Director Liaison and Deputy Director Administration Mandera county and to appoint persons on the basis of fair competition and merit having regard to competence, suitability, experience, qualities and ability is illegal, unconstitutional and null and void ab initio.
  - c. A declaration be issued that the direct appointment of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties to the positions of Assistant Director Liaison, Deputy Director Liaison and Deputy Director Administration, Mandera county respectively without prior advertisement, shortlisting and interview is illegal, unconstitutional and null and void ab initio and ought to be quashed so as to pave way for lawful and competitive recruitment.



- d. A judicial review order of certiorari do and is hereby issued to remove to this court and quash the decision of the respondents to directly appoint 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties to the positions of Assistant Director Liaison, Deputy Director Liaison and Deputy Director Administration, Mandera County, respectively.
  - e. An order do issue directing the respondents to advertise for the positions Assistant Director Liaison, Deputy Director, Liaison and Deputy Director Administration, Mandera county, in a newspaper or newspapers of countrywide circulation within 30 days of the date of this judgment; and to appoint qualified candidates to the said positions within 60 days of the date of the advertisement.
  - f. An order of mandamus do issue compelling the interested parties to refund all monies received from the 2<sup>nd</sup> respondent in form of salaries, benefits and allowances forthwith for the duration of their unlawful appointments and in event within ninety (90) days.
  - g. That the costs of and incidental to this petition be awarded to the petitioner against the respondents.
  - h. That this honourable court be pleased to grant such further order or orders as may be just and appropriate.
2. The petition was based upon the petitioner’s supporting affidavit and exhibits thereto filed together with the petition and sworn on 22.08.2023 as well as the supplementary affidavit sworn on 29.11.2023. The petitioner’s case is as follows:
- a. The 1<sup>st</sup> respondent issued the 1<sup>st</sup> to 3<sup>rd</sup> interested parties with contracts by appointment letters dated 07.06.2023 appointing them to the positions of assistant directors liaison, deputy director liaison and deputy director administration respectively within the county government of mandera, on contractual terms of one year with effect from 07.06.2023.
  - b. Vide a letter dated 20.07.2023 the 1<sup>st</sup> respondent directed the county chief officer, public service management, to include the 1<sup>st</sup> to 3<sup>rd</sup> interested parties in the county government’s payroll as they had been issued with appointment letters as aforesaid.
  - c. Prior to the issuance of the appointment letters to the 1<sup>st</sup> to 3<sup>rd</sup> interested parties, the 1<sup>st</sup> respondent did not advertise any vacancy in the offices of assistant director liaison, deputy director liaison and deputy director administration as required by clauses 3.0.6 and 3.0.8 of the mandera county government manual and section 66 of the [county governments act](#) no. 17 of 2012.
  - d. That the provisions of clause 3.0.8 of the Mandera County Government Manual and section 66 of the [County Governments Act](#) no 17 of 2012 are mandatory to the extent that all vacant posts shall be advertised by the 1<sup>st</sup> respondent in order to reach the widest pool of potential applicants and such advertisements should allow for at least 14 days before closing.
  - e. The 1<sup>st</sup> respondent failed to advertise the subject positions as well as failed to shortlist qualified candidates and carry out any interviews for the said positions before assigning them to the 1<sup>st</sup> to 3<sup>rd</sup> interested parties.
  - f. The 1<sup>st</sup> and 3<sup>rd</sup> interested parties’ appointment to the said positions is shrouded in mystery and secrecy and appears to be motivated by other considerations rather than merit and fair competition.



- g. The 1<sup>st</sup> to 3<sup>rd</sup> interested parties reported to their stations on 07.06.2023 and have been added to the 2<sup>nd</sup> respondent's payroll, where they receive basic monthly salaries of Kshs.87,360/=, Kshs.99,000/= and Kshs.99,000/= respectively plus house allowance, hardship allowances and other allowances per SRC circulars for each of them.
  - h. The petitioner maintains that the irregular and unlawful/illegal appointment of the 1<sup>st</sup> to 3<sup>rd</sup> interested parties has therefore unjustifiably added to the wage bill of the county government of Mandera to the detriment of the residents of Mandera.
  - i. The respondents have overlooked the academic and professional qualifications of other residents of Mandera county who may have been more qualified than the 1<sup>st</sup> to 3<sup>rd</sup> interested parties to hold the subject positions.
3. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed the replying affidavit of Billow Issack Hassan, the County Secretary of the County Government of Mandera, sworn on 09.11.2023. It was filed through Issa & Company Advocates. It was stated and urged as follows:
- a. The petition is anchored on confidential letters of appointment dated 07.06.2023 which letters are personal to the interested parties as well as a letter dated 20.07.2023 between the Secretary, Mandera County Public Service Board and the County Chief Officer, Public Service Management, which documents the petitioner obtained unlawfully and illegally from the personnel files of the interested parties, and the same ought to be expunged from the court record forthwith.
  - b. In exercise of his authority under clause 3.0.3 of the Mandera County Government Manual, which provides that "the governor had the authority to appoint personal staff like chief of staff, advisors and other officers attached to his/her office" and in order to enhance service delivery to the people of the county of Mandera, the 3<sup>rd</sup> respondent appointed the interested parties as personal staff attached to his office to the positions of Assistant Director Liaison Office, Deputy Director Liaison Office and Deputy Director Administrative Office of the Governor respectively as personal staff in his office for a period of one year.
  - c. There is no requirement under clause 3.0.3.1 ii) of the Mandera County Government Manual for vacancies in positions for personal staff of the Governor to be advertised and to be competitively filled by the 1<sup>st</sup> respondent.
  - d. In a meeting of the 1<sup>st</sup> respondent's board held on 07.06.2023 the 1<sup>st</sup> respondent deliberated on the request from the office of the 3<sup>rd</sup> respondent to regularize the appointments of the interested parties as personal staff of the governor. In exercise of its mandate under section 74 of the *County Governments Act*, the 1<sup>st</sup> respondent's board considered among others, that the office of the Governor, the 3<sup>rd</sup> respondent herein, had confirmed availability of budget for the personnel emolument cost of the interested parties and approved the appointment of the interested parties on contractual terms for one year as personal staff of the governor, with effect from 07.06.2023.
  - e. The respondents maintain that the appointment of the interested parties as personal staff of the governor, personnel crucial for service delivery to the people of Mandera was done in a transparent manner and the same was approved by the Mandera county public service board as required by section 74 of the *County Governments Act*. The appointments were therefore not done in violation of the provisions of the *County Governments Act* as alleged or at all.



- f. The petitioner has filed this matter out of malice and bad faith and has concealed that he is a disgruntled former employee of the 2<sup>nd</sup> respondent, reeling from his termination as an employee of the 2<sup>nd</sup> respondent.
  - g. The petitioner was employed as a legal officer sometime in the year 2020 and his employment was terminated for absence from duty without leave or reasonable cause, during which time of absence he was engaging in private practice as the proprietor of a legal practice firm in the name of Maalim & Associates Advocates and still drawing a salary from the county government of Mandera.
4. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
  5. To answer the 1<sup>st</sup> issue, on the values and principles governing employment in the public service, the Court upholds its opinion in Robert Muriithi Ndegwa –Versus- Minister for Tourism, Petition No. 41 of 2012 at Nairobi, thus, “....Article 232 of *the Constitution* provides for the values and principles of public service to include:
    - a. high standards of professional ethics;
    - b. efficient, effective and economic use of resources;
    - c. responsive, prompt, effective, impartial and equitable provision of services;
    - d. involvement of the people in the process of policy making;
    - e. accountability for administrative acts;
    - f. transparency and provision to the public of timely, accurate information;
    - g. subject to paragraph (h) and (i), fair competition and merit as the basis of appointments and promotions;
    - h. representation of Kenya’s diverse communities; and
    - i. affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service of men and women; the members of all ethnic groups; and persons with disabilities.

Section 22 of the *Public Officer Ethics Act*, 2003 provides that public officers shall practice and promote the principle that public officers are selected on the basis of integrity, competence and suitability or elected in fair elections. Thus, by *the Constitution* and by statute, the standards for undertaking public employment have been determined. In the instant case, the petitioner was recruited competitively and it is not said that he lacks qualifications. The court holds that there would be no suitability or merit in public employment in event of presence of bribery, cronyism, nepotism, tribalism, and in absence of qualifications, competence, competition, integrity and respect for inclusion and diversity....”

6. The Court returns that the petitioner has established that the interested parties were appointed in the public service in contravention of the cited values and principles. The Court finds that clause 3.0.3 of the Mandera County Government Manual, which provides that “the governor had the authority to appoint personal staff like chief of staff, advisors and other officers attached to his/her office” is inherently unconstitutional as it offends the cited constitutional and statutory provisions on appointment of public officers. The Court further finds that the provisions undermine the statutory



power of the 1<sup>st</sup> respondent to appoint county public officers and in the manner prescribed under the [County Governments Act](#).

7. To answer the 2<sup>nd</sup> issue the Court returns that it has jurisdiction to hear and determine the petition. It is urged for the respondents that the Court lacks jurisdiction because the petitioner relies on the correspondence about the employment of the interested parties. It is submitted for the respondents that the correspondence as exhibited amounted to violation of Article 50 as it was illegally obtained evidence. However, with or without that correspondence, the Court finds that the respondents have by their own replying affidavit confirmed that the interested parties have been employed in the public service in the stated positions and on account of the 3<sup>rd</sup> respondent's exercise of the purported authority under clause 3.0.3 of the Manderu County Government Manual but which clause the Court has found to be strange as unconstitutional in impact and ultra vires the [County Governments Act](#). Thus even if the correspondence is expunged, the petition will succeed that the appointments of the interested parties have violated the public service values and principles of the prescribed procedure in carrying out appointment. Even if the positions were upon Governor's personal staff and upon Governor's exercise of a delegated authority by the 1<sup>st</sup> respondent (but which has not been suggested or urged), the same would not defeat the obligation to comply with the constitutional and statutory values and principles like of merit, fairness and equality of opportunity, competition, regard to qualifications and participation of the people in a fair recruitment, selection and appointment.
8. To answer the 3<sup>rd</sup> issue the Court returns that the reliefs applied for have been established. However, the prayer that the interested parties refund the monies paid under the otherwise irregular and unlawful contracts will be declined in consideration that they were paid for services actually rendered. The Court considers that it would be inhuman, oppressive, and unfairly torturous for the refund to be granted as prayed for. In any event an order of mandamus will not issue unless it is shown that the person or authority it is directed at has, despite demand, refused or neglected to perform a public or statutory duty in issue – and the Court finds that the test has not been established in the instant case. The petitioner has succeeded and costs will be paid jointly or severally by the respondents.
9. The Court has considered the respondent's case that the petitioner moved the Court maliciously in view that his service with the respondents had been, as alleged, acrimoniously terminated. The Court returns that the petition has been found to be well founded, in the best public interest, and the allegations of malice which has not been established is found irrelevant to the material dispute in issue.
10. In conclusion judgment is hereby entered for the petitioner against the respondents for:
  - a. The declaration that under Article 10,73(2), 232(1) of [the Constitution](#), section 66 and 68A of the County Government Act and clause 3.0.8 of the Manderu County Government Manual 2018, the respondents are under a duty to advertise all vacant positions within the Manderu county public service and to appoint persons to the said positions on the basis of fair competition and merit, having regard to competence suitability, experience, qualities and ability.
  - b. The declaration that the respondents' failure and omission to advertise the positions of Assistant Director Liaison, Deputy Director Liaison and Deputy Director Administration Manderu county and to appoint persons on the basis of fair competition and merit having regard to competence, suitability, experience, qualities and ability is illegal, unconstitutional and null and void/ab initio.
  - c. The declaration that the direct appointment of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties to the positions of Assistant Director Liaison, Deputy Director Liaison and Deputy Director



Administration, Mandera county respectively without prior advertisement, shortlisting and interview is illegal, unconstitutional and null and void *ab initio* and is hereby quashed so as to pave way for lawful and competitive recruitment.

- d. The judicial review order of certiorari do and is hereby issued removing to the Court and quashing the decision of the respondents to directly appoint 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> interested parties to the positions of Assistant Director Liaison, Deputy Director Liaison and Deputy Director Administration, Mandera County, respectively.
- e. The order hereby issued directing the respondents to advertise for the positions Assistant Director Liaison, Deputy Director, Liaison and Deputy Director Administration, Mandera county, in a newspaper or newspapers of countrywide circulation within 30 days of the date of this judgment; and to appoint qualified candidates to the said positions within 60 days of the date of the advertisement.
- f. That the costs of and incidental to this petition hereby awarded to the petitioner against the respondents.
- g. The respondents to pay the petitioner's costs of the petition.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 20<sup>TH</sup> DECEMBER, 2023.**

**BYRAM ONGAYA, PRINCIPAL JUDGE**

