



**Ngunju & another v Kenya Forest Service & another (Employment and Labour Relations Appeal E007 of 2023) [2023] KEELRC 3355 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3355 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E007 OF 2023  
ON MAKAU, J  
DECEMBER 20, 2023**

**BETWEEN**

**JOHN NGUNJU ..... 1<sup>ST</sup> PETITIONER**

**NJAGI MURIUKI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**KENYA FOREST SERVICE ..... 1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petitioners are employees of the 1<sup>st</sup> respondent and they brought this suit on 4<sup>th</sup> April, 2023 seeking the following reliefs: -
  - a. A declaration that the 1<sup>st</sup> Respondents advertisement for recruitment dated 28<sup>th</sup> February 2023 was unlawful, unfair, unjust discriminative and it infringed the rights of the petitioners and was unconstitutional;
  - b. A mandatory injunction compelling the 1<sup>st</sup> Respondent or anybody whosoever acting through them to stop and or stay the interviews recruitments forthwith.
  - c. The advertisement be rectified to suit the graduate corporals and rangers according to career progression and the KFS Human Resource policy and Procedures manual.
  - d. The service to recruit inspector cadets from the serving officers before outsourcing as per the KFS Human Resource Policy Manual.
  - e. General Damages.
  - f. Any other or further relief that this Honourable court may deem fit to grant.



2. The petition is supported by an affidavit sworn on 30<sup>th</sup> March 2023 by the two petitioners jointly. The respondents have opposed the petition vide a Replying Affidavit sworn on 16<sup>th</sup> May, 2023 by the 1<sup>st</sup> respondent's Acting Chief Conservator of Forest, Mr.A.L Lemarkoko.

### **Factual Background**

3. The 1<sup>st</sup> respondent externally advertised for the position of Cadet Inspector in the forestry sector on or about 28<sup>th</sup> February, 2023. According to the petitioners, the said advertisement was unlawful and contrary to the 1<sup>st</sup> respondents HR Policy section 2.16 and section 21 (5.1) C (111) of the 1<sup>st</sup> respondents Career Progression Guidelines which requires that before external advertisement is done, the employer shall first do internal recruitment of the qualified candidates.
4. The petitioners contended that the employer rushed to advertise external recruitment before advertising internally to exhaust the qualified candidate. They filed copies of their decree certificate which is the academic qualification required for the positions advertised. They further filed copies of the 1<sup>st</sup> respondent's HR Policy Manual and Career Guidelines.
5. The 1<sup>st</sup> respondent admitted that it is in the process of advertising and recreating Inspector cadres in line with the Public Service and Kenya Forest Service Rules, policies and Procedures. It contended that it exhausted internal recruitment process as required in Kenya Forest Service HR Policy and Procedure Manual by advertising Internally for promotion of Corporals, Sergeants and Inspectors in April 2022. Further, it shortlisted, interviewed and promoted the successful candidates.
6. Accordingly, the respondents contended that the external advertisement is lawful, non-discriminatory and has not violated the rights of the petitioners. Consequently, they urged the court to dismiss the petition for lack of merits.

### **Submissions**

7. The petitioners filed written submissions whereby they set out the constitutional provision upon which the petition stands. They cited Article 27, 41, 43, and 47 of the Constitution to urge that the respondents have violated their rights through the external advertisement of the Inspector positions before considering them internally.
8. They maintained that the failure to exhaust internal recruitment as provided by the KFS HR Policy Manual and Career Guidelines amounted to discrimination against them and violation of their right to fair labour practices. They further submitted that the advertisement violated Article 73 of the Constitution which requires a state officer to exercise authority in a manner that promotes the Constitution.

### **Issues for determination**

9. I have carefully considered the petition, affidavits and the written submissions. The issues for determination are:-
  - a. Whether the petition meets competence threshold.
  - b. Whether the petitioners rights have been violated by the impugned advertisement.
  - c. Whether the reliefs sought are merited.



## Competence threshold

10. The competence threshold in Constitutional petitions was established in the case of *Anarita Karimi Njeru v Republic* (1979) eKLR where the court held that: -

“...if a person is seeking redress from the High court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
11. In the instant case, the petitioner pleaded in paragraph 5,6,7 and 8 of the petition that they have stagnated in one position for six years without any upward mobility. Further the intended external recruitment amounts to discrimination because the employer has not promoted them in line with the KFS HR Policy Manual since they hold the required academic qualifications.
12. However, the petition does not cite any provision of the *Constitution* which is alleged to have been violated and the manner in which it has been violated. On that basis the petition does not meet the threshold established by the *Anarita Karimi Njeru Case*, supra.
13. The petitioners have attempted to amend the petition vide the written submissions. However, that does not form part of the pleadings. Parties are bound by their pleadings and a court of law is not allowed to travel beyond the pleadings. On that ground alone, the petition must fail and it is struck out. Since the petition is in the form of a public litigation, I will not condemn the petitioners to pay costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 20TH DAY OF DECEMBER, 2023.**

**ONESMUS N MAKAU**

**JUDGE**

**ORDER**

This judgment has been delivered to the parties via Teams video conferencing with their consent, 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**

