



**Omao v County Government of Nyamira & 4 others (Petition
3 of 2023) [2023] KEELRC 3209 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3209 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION 3 OF 2023
CN BAARI, J
DECEMBER 7, 2023**

BETWEEN

VINCENT MARIITA OMAO PETITIONER

AND

COUNTY GOVERNMENT OF NYAMIRA 1ST RESPONDENT

GOVERNOR NYAMIRA COUNTY 2ND RESPONDENT

COUNTY SECRETARY, NYAMIRA COUNTY 3RD RESPONDENT

**CHAIRPERSON, NYAMIRA COUNTY PUBLIC SERVICE BOARD 4TH
RESPONDENT**

**SECRETARY, NYAMIRA COUNTY PUBLIC SERVICE BOARD 5TH
RESPONDENT**

JUDGMENT

1. The petition herein, is dated 20th March, 2023, and was first lodged at the High Court at Nyamira as Petition No. E002 of 2023. Lady Justice W. A. Onkwany in a judgment rendered on 15th June, 2023, transferred the petition to this on account of the High Court lacking jurisdiction to entertain the same.
2. The petition was received at the Kisumu ELRC Registry and registered as Petition No. 3 of 2023, wherein, the Petitioner seeks the following reliefs: -
 - a. A declaration that the Respondents have jointly and severally violated the Petitioner's fundamental rights and freedoms as protected under Articles 27, 28, 41, 47 and 55 of *the Constitution*.



- b. A declaration that the advertisement inviting applications without necessary budgetary approvals is unconstitutional and illegal and in violation of the [Public Finance Management Act](#), 2012.
 - c. An order of cancellation of the advertisements as advertised in the County Website dated March 10, 2023, and the Daily Nation Newspaper of March 9, 2023, within 14 days of issue of an order from this Honourable Court.
 - d. A declaration that the Respondents herein, were obliged and/or enjoined to advertise all the vacancies and/or portfolios in the Nyamira County Government and thereby carry out and/or carry out a transparent and/or accountable recruitment in compliance and/or accordance with Article 10(1),(c) of [the Constitution](#), 2010.
 - e. An order of judicial review in the nature of certiorari be issued to remove into the Honourable Court for quashing the decision of the Respondents to advertise non-vacant and non-existent positions and as conveyed the advertisements by the Respondents, and without due regard to the provisions of the [County Governments Act](#), No.17 of 2012, [Employment Act](#), 2007 and Article 10 of [the Constitution](#),2010.
 - f. An order declaring that the said decision of the Respondents prompting to advertise non-vacant and non-existent positions was illegal and irregular and the same be brought into the Court and be quashed pursuant to an order of certiorari.
 - g. An order of permanent injunction be issued restraining the Respondents either by themselves, agents, servants and/or employees from appointing, employing, recruiting and/or enlisting employees without complying with the due process of the Law, and in particular, the provisions of the [County Governments Act](#), 2012 and Article 10 (1) of [the Constitution](#) of Kenya, 2010.
 - h. A permanent injunction, restraining the Respondents either by themselves, agents, servants and/or employees from admitting the subject employees to the payroll of the 1st Respondent and/or making any payments to and/or in favour of the said employees, either on account of remuneration, allowances and/or salaries, without the necessary budgetary approval of the Nyamira County Government, whatsoever and/or howsoever.
 - i. A permanent injunction restraining the Respondents either by themselves, agents, servants and/or employees, from employing recruiting and/or enlisting employees without complying with the due process of the Law and in particular the provisions of Article 10 (1) of [the Constitution](#), 2010.
 - j. A declaration that the Petitioner be compensated the amount of money that the Court deems sufficient and/or appropriate by the Respondents for the violation of the Petitioner's rights and fundamental freedoms under Articles 27,28,41,47 and 55 of [the Constitution](#).
 - k. This Honourable Court do order that the Costs of this Petition be borne by the Respondents.
 - l. Any other or further orders, writs, and directions this Court considers appropriate and just to grant for the purpose of the enforcement of the petitioner's fundamental rights and freedoms.
3. The petition is premised on the grounds THAT:
- i. The 1st Respondent through the office of the 4th and 5th Respondents caused to be advertised in an advertisement published in the Daily Nation Newspaper on 9th March, 2023, and



another Advertisement posted on 1st Respondent's website on the 10th March, 2023, and the 1st Respondent through the office of the 4th and 5th Respondents declared several posts in various departments vacant, and invited applications from members of the public to submit applications for the posts by the 24th March, 2023.

- ii. There is no budgetary provision for the advertised non-vacant positions as per the 1st Supplementary Budget for the year 2022/2023.
 - iii. The positions of the Director Human Resource Management & Development, Deputy Director HRM, and Positions of Deputy Directors as advertised, have not been declared vacant as the positions have substantive officers who are on permanent and pensionable terms.
 - iv. By adding extra positions for the advertised positions, most of which are non-vacant, and others not in the organizational structure is not only discriminatory, mischievous, and informed by ulterior motives, but also meant to "create vacancies" for political expediency to award cronies after the electioneering period.
 - v. The Recruitment if allowed to proceed, will amount to double spending and akin to the dismissal of poorly remunerated staff in the county Payroll, consequently violating the legitimate expectation of the workers.
4. The Respondents opposed the petition vide a replying affidavit, sworn on 20th November, 2022, by George Ila. The Respondents' state:
- i. That indeed, several posts in various departments were advertised and applications invited to fill the vacancies.
 - ii. That due process of the law was followed in the process of recruitment, and that there was no position that was non-vacant or outside the County organizational structure as alleged.
 - iii. That the process to fill the vacant positions was duly sanctioned by the respective departmental accounting officers, and appropriately approved by the County Executive Committee.
 - iv. That the advertised position arose from the need to replace officers who had exited service either by natural attrition or other causes.
 - v. That once the new officers are on board, their future emoluments will form part of the common emolument kitty.
 - vi. That the ongoing recruitment focused entirely on the need to get on board critical staff necessary for the efficient delivery of services in the County.

The Petitioner's Submissions

5. It is the Petitioner's submission that recruitment in the County Government is carried out by the County Public Service Board (CPSB), and that such a decision has to be initiated by the respective Chief Officers, who are authorized officers as per the Law. It is his further submission that in the instant case, such a process was not adhered to.
6. The Petitioner submits that there is no budgetary provision for the advertised non-vacant positions as provided by the Law.
7. It is submitted that some of the positions that are alleged to be vacant have substantive office holders, who are on permanent and pensionable terms, and that some examples are the positions of the



Director, Human Resource Management and development, Deputy Director HRM as well as Deputy Directors.

8. It is submitted for the Petitioner that most of the positions advertised do not exist in the organizational structure of the County Government of Nyamira and the intended recruitment exercise being undertaken by the Respondents, is a direct affront to the concerns raised by the EACC vide their letter dated December 15, 2021, and September 22, 2022.
9. It is further submitted that the intended recruitment exercise is being carried out in a manner that is in violation of *the Constitution* and is meant to balloon the County wage bill contrary to the principles set out in *the Constitution* and the Law.
10. It is the Petitioner's further submission that in the absence of enough budget to support the recruitment is an act which is contrary to the provisions of Articles 10 of *the Constitution* on prudent use of public resources as provided under the Public Finance and Management Act.
11. The Petitioner submits that even if the Respondents argue contend that the positions sought to be filled are essential and/or critical, the same cannot be carried out in the face of apparent illegalities. The Petitioner placed reliance on the case of *Biwott v County Public Service Board Baringo County & another* (Constitutional Petition E010 of 2022) [2022] KEELRC 1360 (KLR) (29 July 2022) (Ruling), where the Court held thus;

“The Court may agree with the 2nd Respondent that the positions sought to be filled are essential and necessary for effective service delivery to the people of Baringo County, however such urgency must not contravene the Constitutional and statutory safeguards in place to protect public finance from misallocation and use.”

The Respondents' Submissions

12. The Respondents submit that the petition does not disclose any violation of Constitutional rights by the Respondents, and that it is a mere allegation of infringement of Fundamental Rights and Freedom by the Petitioner without any proof. The Respondents sought to rely on the Court of Appeal decision in *S.J vs. Francesco Di Nello & another* [2015] eKLR, for the holding that the burden of proof of any fact or allegation is on the Petitioner.
13. It is submitted for the Respondents that Article 235 (1) of *the Constitution* read with Section 59 of the County Government's Act, 2012, gives the County Government staffing powers, and that it is pursuant to this provisions that the Respondents commenced the process of recruiting staff to various positions by advertising on the County Website and the Daily Nation Newspaper. It is further submitted that in the advertisement, the Respondents invited all competent and qualified persons to fill the vacant positions.
14. The Respondents further submit that the advertised positions arose from the need to replace officers who had exited service. The Respondent cited Section 59 of the County Government's Act, which sets out the functions and powers of a County Public Service Board to includes establishing offices in the county public service.
15. The Respondents submit that an Order of Certiorari is issued when the action complained of is made without authority. They relied on the Court of Appeal decision in *Kenya National Examination Council-Versus-republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR to buttress this position.



16. The Respondents submit that the Petitioner has not demonstrated reasonable cause for the issuance of a permanent injunction against the Respondents for exercising their Constitutional mandate, and statutory duties and obligations. They sought to rely in the case of *Giella vs. Cassman Brown* [1973] EA 358.

Analysis and Determination

17. I have considered the petition, the reply by the Respondents and the rival submissions. The issue that arise for determination are:

- i. Whether the petition meets the threshold for Constitutional petitions.
- ii. Whether the Petitioners deserve the reliefs sought.

Whether the petition meets the threshold for Constitutional petitions.

18. The Petitioner's contention is that the Respondents put out an advertisement to fill 357 positions in the service of the 1st Respondent, whose total monthly cost to the County Government in terms of salaries is Kshs. 30,000,000/-. It is his further contention that the 1st Respondent's annual development plans, budget review outlook, budget estimates, approved budget and appropriation documents do not support the intended recruitment.
19. It is the Petitioner's further assertion that the positions advertised are not vacant, and the new positions that were created are not those contemplated under the county Government Act, 2012. He asserts further that the 1st Respondent's wage bill will be so high that there will be no money left for development.
20. The Respondents on their part, contend that the petition does not disclose any violation of Constitutional rights by the Respondents, and that it is a mere allegation of infringement of Fundamental Rights and Freedom by the Petitioner without any proof.
21. The Respondents further contend that Article 235 (1) of *the Constitution* read with Section 59 of the County Government's Act, 2012, gives the 1st Respondent staffing powers, and that it is pursuant to that mandate that they advertised to fill the positions subject of this petition.
22. The Petitioner's contention is that the recruitment mounted by the Respondents violated Articles 27(4) on discrimination, failure to observe national values, lack of transparency and abuse of power. It is his further case that the recruitment breached the County Government Act, by conferring undue advantage on an undisclosed individual and failure to competitively fill vacant positions.
23. It is now settled that allegations of Constitutional violations must be pleaded with reasonable precision. In the case of *Anarita Karimi Njeru vs Republic* (1979) eKLR cited in *Sostenah Ogero Taracha v Ethics and Anti-Corruption Commission and Attorney General* (2017) eKLR it was stated:-

“We would, however, again stress 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 matter in which they are alleged to be infringed.”



24. Further, in the case of *Sostenah Ogero Taracha (supra)* the Court held that: -
- ‘It is not however, enough to allege that one’s fundamental freedoms or rights have been violated. The violation must be proved.....’
25. The Respondents published an advertisement calling qualified applicants to apply for various positions. The titles of these positions as well as the number of vacant posts, were clearly stated in the advertisement. Further, the advertisement was on a newspaper with nationwide circulation.
26. The documents produced in evidence by the Petitioner indicates that the Respondents had a budget for recurrent expenditure; specifically, compensation to employees for each of the departments that was recruiting, as well as a separate budget for development. The Petitioner has therefore not shown that the money budgeted for development is the same money the Respondents intended to use for recurrent expenditure.
27. Further, the Petitioner has not shown what the salary entitlement for each of the newly recruited employees is, so as to prove that their recruitment and subsequent appointment will exceed the budget set for recurrent expenditure.
28. Other than making sweeping statements, the Petitioner has in my view, not set out the specific Constitutional provisions which he believes have been violated or threatened, and the manner in which the Respondents have violated those provisions.
29. Having advertised the positions in a newspaper with nationwide circulation, it is not clear how else the Respondents would have made the recruitment more competitive. The Petitioner also did not prove how an open advertisement for jobs would discriminate against any member of the public or how some segment of the public will have an undue advantage.

9. In *Sella Rose Anyango v Attorney General and 2 Others (2021) eKLR* the Court held: -

‘The case of *Anarita Karimi Njeru (supra)* has been relied upon from time and time again to demonstrate the threshold of a successful Constitutional Petition. It should be appreciated the requirements for a successful Constitutional Petition are simple and are thus; the Petitioner should set out the Constitutional provisions, which he believes have been violated or threatened, and the manner in which the Respondent(s) have violated those provisions. It is not enough for the Petitioner to just list the Constitutional provisions without demonstrating how they were infringed upon.’

30. In my view, the petition does not meet the strict threshold set in *Anarita Karimi Njeru case (supra)* on account of the Petitioner failing to prove with precision his allegations of Constitutional violations.
31. The petition is devoid of merit and is hereby dismissed with no orders as to costs.
32. Judgment of the Court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 7TH DAY OF DECEMBER, 2023.

C. N. BAARI

JUDGE

Appearance:

Mr. Marita h/b for Mr. Mainga for the Petitioner



N/A for the Respondents

Erwin Ongor - C/A

