



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 38 OF 2020

(Originally Nairobi High Court Petition No. E409 of 2020)

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 1, 2, 3, 10, 73, 174, 175, 232 AND 235 OF THE
CONSTITUTION**

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTION 58(2) OF THE COUNTY GOVERNMENTS ACT, 2012

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTIONS 5 AND 6 OF THE PUBLIC APPOINTMENTS (COUNTY
ASSEMBLY) APPROVAL ACT, 2017**

BETWEEN

EVANS LADTEMA MUSWAHILI.....PETITIONER

v

VIHIGA COUNTY PUBLIC SERVICE BOARD.....RESPONDENT

RULING

1. Evans Ladtema Muswahili (the Petitioner) is an ardent public/human rights defender within the County of Vihiga.
2. On or around 9 December 2020, the Petitioner moved the High Court contending that the County Public Service Board, Vihiga (the Board) had been operating unlawfully and contrary to the expectations of Article 235(1) of the Constitution as read with section 59(1)(g) of the County Governments Act and Regulation 119(2) of the Public Finance (County Governments) Regulations, 2015 because it had not developed or put in place a County Human Capital/Resource Plan.
3. The Petitioner sought the following remedies:
 - (a) A declaration that a County Public Service Board cannot legally carry out recruitment for a County Government outside and or without the respective County Human Capital Plan/Human Resource Plan.
 - (b) A declaration that the advertisement by the Respondent as contained in the Standard Newspaper of 12th October 2012 (sic-2020) and any resulting recruitment from the advertisement are unconstitutional, illegal, null and void.
 - (c) An order of certiorari quashing the advertisement by the Respondent contained in the Standard Newspaper of 12th October 2012 (sic 2020) and any recruitment resulting from the said advertisement.
4. The High Court declined jurisdiction and directed that the Petition be transferred to this Court.
5. On 24 March 2021, the Court issued directions including the filing of submissions.
6. The directions were not complied with and on 29 June 2021, the Court gave fresh directions including that the parties file and exchange submissions on a jurisdictional question anchored on Article 234(2)(i) of the Constitution as read with section 77 of the County Governments

Act and sections 85, 86 and 87 of the Public Service Commission Act.

7. Both the Petitioner and the Board filed their submissions on 7 October 2021.

Jurisdiction: Exhaustion of alternative dispute resolution avenues

8. In his submissions, the Petitioner asserted that the development of a Human Capital Plan is not an exercise or purported exercise of disciplinary control and therefore the appellate process envisaged for the Public Service Commission by Article 234(2)(i) as read with section 77 of the County Governments Act and sections 85, 86 and 87 of the Public Service Commission Act did not apply to the instant dispute.

9. On the other hand, the Board took the view that the Petition did not disclose any constitutional questions because the development of the County Human Capital/Human Resource Plan was not a constitutional requirement.

10. The Board further contended that the Petitioner was challenging its recruitment powers as well as the function of setting terms and conditions of service of county public service employees and consequently by dint of section 77 of the County Governments Act as read with sections 85, 86 and 87 of the Public Service Commission Act, he should have moved the Public Service Commission in the first instance.

11. The Court has considered all the material placed before it.

12. At the core of the Petitioner's complaint was a recruitment advertisement by the Board carried in the newspapers on 12 October 2020.

13. The mandate of the Public Service Commission under Article 234(2)(i) of the Constitution is not restricted to appeals emanating from exercise or purported exercise of disciplinary control in respect to county governments public service.

14. The mandate is wider and by dint of section 77(2) of the County Governments Act encompass *recruitment, selection, appointment and qualifications attached to any office and remuneration and terms and conditions of service* (there are other functions).

15. In the Court's view, the Petitioner's first port of call before invoking the Court's jurisdiction should have been to exhaust the appellate process as contemplated within the legal framework alluded to above.

16. The Petitioner invoked the Court's jurisdiction prematurely.

17. The Court has also looked at the functions of a County Public Service Board as outlined in section 59 of the County Governments Act and agrees with the Board that the facilitation of the development of a human resource plan is not a constitutional question but one which can be resolved in the normal way rather than as a Constitutional dispute.

18. Lastly, the Petitioner sought orders which would have adversely affected other county public service boards which were not parties to the litigation. Caution would dictate that orders with such polycentric ramifications should not be made lightly without affording all the parties likely to be affected an opportunity to be heard.

Conclusion and Orders

19. For the above reasons, the Court not only declines jurisdiction but finds the Petition without merit and it is struck out with no order on costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 26TH DAY OF JANUARY 2022.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Petitioner EK & Associates

For Respondent Migos-Ogamba & Waudo Advocates

Court Assistant Chrispo Aura