



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. E028 OF 2021

IN THE MATTER OF

**ALLEGED CONTRAVENTION OF ARTICLES 1, 2, 3, 10, 232 AND 235 OF THE CONSTITUTION
AND
IN THE MATTER OF ALLEGED CONTRAVENTION OF THE COUNTY GOVERNMENTS ACT, 2012**

BETWEEN

EVANS LADTEMA MUSWAHILI.....PETITIONER

v

VIHIGA COUNTY PUBLIC SERVICE BOARD.....1st RESPONDENT

GOVERNOR, VIHIGA COUNTY.....2nd RESPONDENT

COUNTY ASSEMBLY OF VIHIGA.....3rd RESPONDENT

AND

MARLEY EZEKIEL AYIEGO.....INTERESTED PARTY

JUDGMENT

1. On or around 6 March 2020, the County Public Service Board, Vihiga (the Board) advertised for the position of County Secretary. The last date for receipt of applications was indicated as 25 March 2020.
2. Among the qualifications set by the Board was a Master's degree.
3. The Board conducted interviews and on or around 29 April 2020, it sent names of 3 of the applicants including Marley Ezekiel Ayiego (the Interested Party) to the Governor for nomination.
4. On 11 May 2020, the Governor notified the County Assembly of the nomination of the Interested Party as the County Secretary.
5. The County Assembly caused the Committee on Appointments to look into the nomination, and a public vetting notice was issued to the public and the nominee to appear before the Committee on 21 May 2020.
6. On or around 27 May 2020, the Committee recommended to the County Assembly to approve the nomination of the Interested Party.
7. The County Assembly approved the recommendation and the Interested Party was gazetted as the County Secretary on 5 June 2020.
8. The Petitioner was aggrieved with the appointment process and on 3 May 2021, he moved the Court alleging that the appointment was unlawful because the Respondents had not given the 21-days' notice envisaged by section 5 of the Public Appointments (County Assembly Approvals) Act; the advertisement had an academic qualification of Master's degree not provided for under section 44 of the County Governments Act thus locking out other qualified and interested applicants and that members of the public were not notified of the nomination as expected under section 6(2) of the Public Appointments (County Assembly Approval) Act.

9. The Petitioner further challenged the appointment on the ground that the Governor, rather than the Board, had set out the terms and conditions of service for the Interested Party.

10. The Interested Party filed a replying affidavit in which he deposed that the qualification of a master's degree was just one of the qualifications and that he was not aware of any applicant who was denied a chance on that ground; that the public was notified of the vetting process but did not challenge his nomination before the County Assembly and that the Petitioner had failed to disclose that he had filed Vihiga High Court Petition No. 1 of 2021, *Evans Ladtema Muswahili v Vihiga County Public Service Board* raising the same issues and which Petition was struck out.

11. The Chairperson of the Board filed an affidavit on 20 May 2021 wherein he asserted that the Board complied with all provisions on the recruitment process as set out in section 44 of the County Governments Act (amended in July 2020) and that bachelor's degree was only a minimum requirement and that the requirement for a master's degree was just an added advantage; that the Petitioner should have first objected under section 8 of the Public Appointments (County Assemblies) Approval Act and that the Issues raised in the Petition had been the subject of adjudication in Vihiga High Court Petition No. 1 of 2020, *Evans Ladtema Muswahili v Vihiga County Public Service Board* which had been struck out for failing to meet the threshold set in the *Anarita Karimi Njeru vs. Attorney General* (1979) KLR 154 case.

12. The Petitioner filed his submissions on 28 May 2021 while the Interested Party filed his submissions on 17 June 2021.

13. On 25 June 2021, the Board filed a Preliminary Objection contending that the Petitioner had not exhausted the appellate process provided for under section 77 of the County Governments Act as read with section 87(2) of the Public Service Commission Act, and for non-joinder of necessary parties.

14. Pursuant to directions issued by the Court on 29 June 2021, the Board filed submissions on 29 July 2021, while the Petitioner filed further submissions on 7 October 2021.

15. The Court has considered the Petition, Motion, affidavits, Preliminary Objection and the submissions and come to the view that the Petition and Motion should be disallowed for the reasons that follow herein.

16. First, the Petitioner approached the High Court in Vihiga in Petition No. 1 of 2021, *Evans Ladtema Muswahili v Vihiga County Public Service Board* to challenge the appointment of the Interested Party as County Secretary, and the High Court struck out the Petition.

17. At the time the Petitioner was moving this Court on 3 May 2021, the High Court had struck out the Petition after giving a considered Ruling.

18. The Petitioner did not disclose that he had sued the Respondents before the High Court on the same facts and legal underpinning.

19. In the view of this Court, that disclosure was necessary and more so because the Petitioner had in his wisdom decided to approach the High Court on the understanding that it was the Court with jurisdiction.

20. It would not be speculative to conclude that the Petitioner was forum shopping.

21. Second, Article 234(2)(i) of the Constitution as read with section 77(2)(a),(b) and (d) of the County Governments Act and sections 85(a), (b) and (d), 86 and 87(2) of the Public Service Commission Act has set out alternative dispute resolution avenues in respect to disputes emanating from a recruitment process by a county public service board.

22. The Petitioner did not demonstrate that he even attempted to comply with the prescribed appellate avenue.

23. The Court of Appeal in *Speaker of the National Assembly v Karume* (2008) 1KLR 425 said of alternative dispute resolution:

Irrespective of the practical difficulties enumerated... these should not in our view be used as a justification for circumventing the statutory procedure... in our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

24. In respect to section 77 of the County Governments Act, the Court of Appeal held in *Secretary, County Public Service Board v Haulbhai Gedi Abdille* (2017) eKLR:

There is no doubt that the Respondent initiated judicial review proceedings in utter disregard to the dispute resolution mechanisms availed by section 77 of the Act. The section provides not only the forum through which the Respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialised one specifically tailored by the legislators to meet the needs such as the Respondents. In our view, the most suitable and appropriate recourse for the Respondent was to invoke the appellate procedure under the Act rather than resort to the judicial proceedings in the first instance.

25. For the above reasons, the Court strikes out the Petition.

26. The Petitioner did not disclose that he had filed a Petition before the High Court on the same subject matter. He is ordered to bear the Respondents costs.

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

RADIDO STEPHEN, MCIARB

JUDGE

For 2nd Respondent Esth
Andisi, Principal Legal
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Officer, Office of
the County

Attor
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For 3rd Respondent Fran Ot
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Counsel, County

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For Interested Party Esth
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