



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

ELR PETITION NO. E002 OF 2020

BARASA KUNDU NYUKURI.....1ST PETITIONER

RAPHAEL MAKOKHA WERE2ND PETITIONER

TORCH AFRICA.....3RD PETITIONER

VERSUS

GOVERNOR OF COUNTY GOVERNMENT OF BUNGOMA & 7 OTHERS

AND

COUNTY ASSEMBLY OF BUNGOMA & 5 OTHERS...INTERESTED PARTY

J U D G M E N T

1. The Petitioners in the Petition dated 10th November 2020 Barasa Kundu Nyukuri (1st Petitioner) Raphael Makokha were (2nd Petitioner) and Torah Africa (3rd Petitioner in Public Interest under the Constitution, Article 1,2,3 10,22,23 27,28,33 35,43,46 47,48,50,165 174,258 and 259 seeking the following orders:-

a. That this Honourable court declares the advertisement, shortlisting interview and recruitment and deployment of village without an appropriate policy framework, regulations adequate and specific budgetary allocation of fund is illegal irregular and therefor null and void.

b. That this Honourable court grants orders to the effect that the Respondents herein should not advertise, shortlist, interview and employee village administrators or hire any other staff before confirming the 453 casual workers of the Local Authorities and over 400 current casual workers as employees of the County Government of Bungoma on permanent and pensionable terms as well as paying them their accumulated salary arrears. The Petition is supported by affidavit sworn by Barasa Kundu Nyukuri on the 10th November 2020 annexing supporting documents.

2. The Petitioners concurrently filed a notice of motion of same date seeking interim orders. The Petitioners through Barasa Kundu Nyukuri filed further affidavit and evidence in support of the Application and the petition sworn on the 28th April, 2021.

3. The Respondents entered appearance on the 7th June 2021 through memorandum of appearance dated 24th May, 2021. The Respondents(1,5,6,7 and 8) filed replying affidavit sworn by Cyril Simiyu Wayong'o on the 3rd June 2021.

4. The Petitioners filed further affidavit in response to the response of 1st, 5th, 6th, 7th and 8th respondents sworn by Barasa Kundu Nyukuri on the 26th July 2021.

5. On the 7th June 2021 Justice Radido gave directions that this Petition and the two motion applications be heard together . On the 30th June 2021 Justice Radido further gave directions for filing of submissions and mention date for Judgement date. On the 4th October 2021 Justice Radido sitting in Kisumu transferred the file to this court. On the 6th December 2021 the court having confirmed filing of submissions written by parties as earlier directed gave judgement date.

6. The Petition is thus canvassed by way of written submissions. The Petitioners' written submissions were filed on the 29th July 2021. The

Respondent's(1st ,5th , 6th , 7th and 8th) written submissions were filed in court drawn by Annet Namulasi & Co. Advocates on the 12th August 2021.

DETERMINATION

Issues for determination

7. The Petitioner's in their written submissions identified the following issues for determination by court:-

- i. Whether or not the Application and Petition No. E002 of 2020 is Resjudicata,
- ii. Whether or not the advertisement for the recruitment of village administrators is constitutional and legal ,
- iii. Whether or not the taskforce that recommended the establishment of 236 village unit was legal and whether we have legal and legitimate boundaries of village units in Bungoma County,
- iv. Whether or not the County government of Bungoma has approved budget line and funds for recruitment of village administrators,
- v. Whether or not the wage bill of the County Government of Bungoma can accommodate more new employees in the position of 236 village administrators.

8. The Respondent reiterated the same issues save for leaving out issue No. 5 in the Petitioner's list. The court finds that the gravamen or essence of the Petition and the motion applications is the challenge of recruitment of the 236 village administrators of Bungoma County by the 2nd Respondent following an advertisement dated 2nd November 2020.

9. In recent case handled by this court being *E012 of 2021, Oliver Mukhebi and 28 others -vs- County Public Service board of Bungoma and County Government of Bungoma*, in which the 1st Petitioner in the instant petition sought unsuccessfully to be enjoined as an interested party, the Petitioner in that decided case raised similar issues and challenged the very same recruitment exercise, and in the case it was disclosed to this court the impugned recruitment exercise is complete and the successful 236 candidates have since been appointed as village administrators for Bungoma County. Consequently the court finds prayer 2 in the Petition is spent. The court found it has no jurisdiction over challenge of recruitment of county officers.

10. On issue (a) the court considers the issue of resjudicata. The Respondent submitted the instant petition is resjudicata the object being litigation must come to an end. The Respondent submits that Petition E001 of 2020 *Joseph Khaoya -vs- The Chairman, County Public Service Board and others* by a resident of Bungoma challenging the impugned recruitment exercise as unlawful on account of lack of budget, lack of scheme of service, and that such village unit had not been delineated had been decided on merit.

11. The Respondent further submits in the said decision by Radido Judge the court considered the findings in *Bungoma High Court "Petition NO. 9 of 2018 Iddi Muyonga -vs- Elizabeth Wanyonyi* where the High Court found no merit in the challenge to delimitation of village units and recruitment process. The Respondent submits that the instant case is carbon copy of the 2 dismissed petitions. That the Petitioners' raise same issues that this Honourable court has already applied its judicial mind to by finding that the question of delimitation of boundaries and or budget are misplaced.

12. The term Resjudicata under the Black's law Dictionary (10th Edition) by Bryan A. Garner is defined as an issue that has been definitely settled by judicial decisions. The said dictionary states that there are three essential elements of resjudicata namely:-

- i. In an earlier decision same issues were raised.
- ii. A final judgement on merits and
- iii. the involvement of same partes or parties in privity with the original parties.

13. The Petitioners plead with the court not to view the Application and Petition with lense of Section 7 of the Civil Procedure Act but instead objectively and fairly determine the petition on own merit. Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya on Resjudicata states as follows:-

“ No court shall try an suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or under whom they or any of them claim , litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by the court”.

14. The instant case challenges the recruitment of 236 village elders in Bungoma County arising from advertisement by the Respondent on 2nd November 2020. In the decided case of this court by my brother Justice Radido *John Wekesa Khaoya -vs- Chairman, County Public Service Board of Bungoma & 3 others, County Assembly of Bungoma interested party (2021)* eKLR the petitioner challenged the recruitment process under the same advertisement of 2nd November 2020 raising substantially same grounds as in the instant case. Section 7 of the Civil Procedure Act is binding on this court hence the plea by the petitioner is not acceptable.

15. In the said decided petition of John Khaoya (Supra) in its judgement on merits of the Petition the court held that the question of delineation of boundaries and /or budget is therefore misplaced. On the question of a scheme of service, the court held that , 'it is the view of the court that the lack of such a scheme cannot invalidate an advertisement or recruitment process as it would be speculative.' The Court finds that these are the same or similar issues brought before court in the instant petition for consideration in the impugned recruitment of the village elders in Bungoma County. In the circumstances the court has no choice but to declare the petition resjudicata.

16. Consequently this Petition and the motions application filed herein are found to be without merit, resjudicata and also overtaken by events the said village administrators having been issued with appointment letters.

17. The Petition dated 10th November, 2020 is dismissed together with the motion applications filed herein.

18. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 10TH FEBRUARY, 2022

J. W. KELL,

JUDGE.

In the presence of

Court Assistant: Brenda Wesonga

Petitioner:- Absent

Respondent: Absent