



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. 18 OF 2019

IN THE MATTER OF ARTICLES 1, 2, 3, 27, 35, 41, 47,

75, 156, 232, 233, 234 AND 236 OF THE CONSTITUTION

AND

IN THE MATTER OF THE OFFICE OF THE ATTORNEY GENERAL ACT, 2012

AND

IN THE MATTER OF THE PUBLIC SERVICE COMMISSION ACT, 2012

AND

IN THE MATTER OF THE NATIONAL GOVERNMENT CO-ORDINATION ACT, 2013

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

FRANCIS ODHIAMBO AWINO.....PETITIONER

v

HON ATTORNEY GENERAL.....1st RESPONDENT

PUBLIC SERVICE COMMISSION.....2nd RESPONDENT

PRINCIPAL SECRETARY,

MINISTRY OF INTERIOR AND NATIONAL CO-ORDINATION.....3rd RESPONDENT

THE REGIONAL COORDINATOR, NYANZA PROVINCE.....4th RESPONDENT

DEPUTY COUNTY COMMISSIONER, NYAKACH SUB-COUNTY.....5th RESPONDENT

COUNTY COMMISSIONER, KISUMU COUNTY.....6th RESPONDENT

AND

KENNEDY OMONDI ADERO.....1st INTERESTED PARTY

CALEB OCHIENG OYOO.....2nd INTERESTED PARTY

GEORGE OTIENO MIGWAMBO.....3rd INTERESTED PARTY

JUDGMENT

1. In a Petition lodged with the Court on 12 June 2019, Francis Odhiambo Awino (the Petitioner) alleged that the re-advertisement for the position of Chief, West Kabodho location on 22 October 2018, and appointment of one Kennedy Omondi Adero as Chief was unconstitutional and irregular.
2. The Petition was accompanied with a Motion under a certificate of urgency, and when they were placed before the Duty Court in Nairobi on 17 June 2019, it ordered that the *status quo* be maintained, and further that service be effected.
3. The Respondents were directed to file and serve responses and further that the file be mentioned on 26 June 2019.
4. On 26 June 2019, the Court directed that the file be transferred to the Court sitting in Kisumu.
5. When the Petition and Motion were placed before the Court in Kisumu on 9 July 2019, the Petitioner indicated that he had not served the Respondents and the Court directed that in lieu of the Motion, the Petition determined.
6. The Petitioner was directed to serve the Petition.
7. The Court also directed the filing and exchange of responses and submissions.
8. On 16 August 2019, the Petitioner filed an Amended Petition. He also filed a supplementary affidavit.
9. When the parties returned to Court on 17 October 2019, the Respondents sought for more time to respond to the Petition and the Court granted them more time.
10. The Deputy County Commissioner, Nyakach filed a replying affidavit in response to the Petition on 7 February 2020.
11. The parties did not file submissions within agreed timelines and the Court issued fresh orders on 13 February 2020.
12. The Petitioner filed his submissions on 15 December 2020, while the Respondents filed submissions on 22 April 2021.
13. The Petitioner identified the Issues for adjudication as:
 - (a) Whether the Petition raises constitutional questions?
 - (b) Whether the purported appointment of the 1st Interested Party was unlawful, null and void?
14. On their part, the Respondents outlined 2 Issues in dispute:
 - (a) Whether the Petitioner has proved any violation of his rights?
 - (b) Whether the Petitioner is entitled to the reliefs sought?
15. When the Petition was placed before the Court on 16 November 2021, it indicated that it would deliver a judgment today.

Assertions by the parties

16. The Petitioner challenged the appointment of the 1st Interested Party as Chief on the grounds that he lacked some of the qualifications which had been set out in the advertisement.
17. According to the Petitioner, the 1st Interested Party did not meet the age criteria (not less than 35 years old), was not a resident of Kabodho West location at the material time and was a person of questionable character.
18. The Petitioner also contended that the appointment process was not open or competitive since the 2nd Interested Party was ranked above the 1st Interested Party.
19. The Petitioner further asserted that the recruitment process violated the national values and principles as enshrined in Article 10 of the Constitution, was discriminative and contravened the rights to fair labour practices and fair administrative action.
20. In a further challenge to the recruitment process, the Petitioner argued that the advertisement for the position of Chief was not published

to the larger public and that the 2nd and 3rd Interested Parties only got to learn of the advertisement on the eve of the interviews on 7 March 2017.

21. In response to the Petition, the Respondents asserted that upon the office of Chief becoming vacant in 2016, the 2nd Interested Party who was already serving as an Assistant Chief was appointed to act and a first recruitment exercise was carried but due to administrative issues, the process was cancelled and a re-advertisement carried out.

22. However the second recruitment process was also cancelled because none of the applicants met the prescribed requirements.

23. As a consequence, a third recruitment process was conducted and the 1st Interested Party who was ranked first was appointed to the post.

24. The Court has considered the Petition, affidavits and submissions.

Whether the recruitment and appointment of 1st Interested Party was legal

25. The Petitioner alleged that the 1st Interested Party did not meet the age criteria because he was below 35 years of age. No evidence was placed before the Court to corroborate the assertion.

26. The interview notes produced in Court by the Respondents indicate that the 1st Interested Party was 35 years old at the time of recruitment.

27. Secondly, the Petitioner made another assertion that the 1st Interested Party was not a resident of Kabodho West location. The allegation was not proved nor was an application made to obtain the 1st Interested Party's identity documents to verify the residence or location details.

28. Thirdly, it was argued that the recruitment process was not open or competitive.

29. The first interviews scheduled for 8 March 2017 were cancelled and it is of no moment that the 2nd and 3rd Interested Parties learnt of the same on the eve of interviews. Moreover, these parties did not swear affidavits to disclose when they learnt of the interview dates.

30. Further, the notes of the interview filed in Court show that 4 person applied for the position but only 3 were shortlisted because they met the minimum qualifications.

31. The Court cannot therefore find fault with the Respondents on the ground that the recruitment was not open or competitive because the persons who applied were all subjected to the same minimum criteria.

32. The Petitioner did not adduce any evidence in respect to the 1st Interested Party's lack of integrity or moral competence to make him unfit to hold public office.

Conclusion and Orders

33. From the foregoing, the Court finds that the Petitioner did not prove that the recruitment and appointment of the 1st Interested Party was either unlawful or a violation of the legal framework in place.

34. The Petition is dismissed with costs to the Respondents and 1st Interested Party.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 9TH DAY OF FEBRUARY 2022.

Radido Stephen, MCI Arb

Judge

Appearances

For Petitioner M.I. Wafula & Associates

For Respondents Lorna Orege, Senior Litigation Counsel, office of the Hon Attorney General

Court Assistant Chrispo Aura