



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

PETITION NO.21 OF 2020

(Before D.K.N.Marete)

HON.GEOFFREY KING'ANG'I MUTURI.....PETITIONER

VERSUS

THE DEPUTY COUNTY COMMISSIONER

MBEERE SOUTH SUB COUNTY1ST RESPONDENT

THE HON.ATTORNEY GENERAL.....2ND RESPONDENT

J U D G M E N T

This matter was originated by way of a petition dated 9th September, 2020. It does not disclose any issue in dispute on its face.

The Respondent does not file a response to the petition. However, brings in written submissions in defence.

This case involves an allegedly botched of recruitment of an Assistant Chief II's for the Mbeti south, Kianjiru and Kithunthiro locations in Mbeere South sub-county of Embu County. The alleged anomaly was by not inviting eligible applicants to apply for these positions and also not involving public participation in the recruitment process.

The Petitioner is the Member of Parliament for Mbeere constituency and a resident of Mbeere South Sub-County.

His case is that vide a public notice dated 31st August, 2020 the 1st Respondent published a list of shortlisted candidates for the post of Chief II for Mbeti south, Kianjiru and Kithunthiro locations and further directed the candidates to report to his office at Mbeere south for interviews scheduled for 10th September, 2020 at 800hrs. The publication had 19 candidates shortlisted for the interview.

The Petitioner's further case is that the 1st respondent failed to give adequate and reasonable period for members of the public to verify the shortlisted candidates for purposes of vetting with a view to establishing their compliance with a requirement of such leadership and Article 10 (c) and chapter 6 of the Constitution.

It is his other case that such vetting was necessary as some of the candidates were known alcoholics and criminals while others were non-residents of the areas they were being recruited into. It was therefore necessary that the recruitment be suspended until members of the public and other stake holders had had their input and character, competence and suitability of the shortlisted candidates.

The Petitioner avers that there had been previous adverts for the same position in different areas by the 1st Respondent earlier on. She ended up with a shortlist of 36 candidates who were rushed through the interview process in secret and clandestinely and without affording the public participation to the process. This is illustrated thus;

5. That subsequently, on 21st July 2020 the Deputy County Commissioner issued another advertisement for the post of Chief II for the Mbeti south, Kianjiru and Kithunthiro locations inviting eligible Applicant to apply. Annexed and marked GKM 2 is a copy of the advertisement for the post of CHIEF II.

The Petitioner's further case is as follows;

- That the 1st Respondent has failed to allow adequate time and unreasonable period for members of the public to participate in the

process.

· Vide a Public Notice dated 31st August 2020, the 1st Respondent published a list of shortlisted candidates for the post of Chief II for the Mbeti South, Kianjiru and Kithunthiro locations and further directed the said candidates to report to his office at Mbeere south for interviews scheduled begin on 10th September, 2020 at 8.00.

· That in the said publication there are a total of nineteen (19) candidates who have been shortlisted and who were expected to be interviewed as from 10th September, 2020.

· Candidates for the purposes of vetting so as to establish their compliance with the requirements of such leadership and to satisfy the provisions of the Constitution under Article 10 (c) and Chapter 6.

· That some of the shortlisted candidates are known alcoholics while others have been involved in criminal activities while others are non-residents hence it is important and in public interest that the recruitment process be suspended until the Petitioner, the members of Public and other stake holders are given ample time to present their views on the characters, competence and suitability of the shortlisted candidates.

The Petitioner's case is that he and another stakeholder, Maendeleo ya Wanawake raised issues on this matter with the 1st Respondent but she was unyielding.

Again, the Respondent's conduct is an affront to Articles 10 (2) (a) and (c) that provide for public participation and good governance *et al* as natural values and principles of good governance.

He prays as follows;

i) A declaration that the recruitment process for the position of CHIEF II for Mbeti South, Kianjiru and Kithunthiri and posts for the Assistant Chiefs II Job Group "F" Gichiche sub location in Gichiche location, Gachuriri sub location in Mbeti South location and Wachoro sub location in Mbeti south location and Wachoro sub location in Karaba location has to be done in strict compliance with Article 10 of the Constitution on the national values and principles of governance include (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.

ii) An order nullifying the appointment, recruitment and/or otherwise for the post of ASSISTANT CHIEF II Job Group "F" Gichiche sun location in Gichiche location, Gachuriri sub location in Mbeti south loction and Wachoro sub location in Karaba location until the public has fully participated in the unveiling the characters of the said recruits as enshrined under the Constitution.

iii) An order compelling the 1st Respondent to conduct a meaningful public participation by allowing the Petitioner, residents of Mbeere South Sub-county, general members of the public and other stake holders to present their views and or written memoranda touching on the integrity, suitability and competence of the shortlisted candidates for the posts of Chief II for the Mbeti south, Kianjiru and Kithunthiro locations and Assistant chief II Job Group "F" Gichiche sub location in Gichiche location, Gachuriri sub location in Mbeti south location and Wachoro sub location in Karaba location.

The Respondent did not file a Replying Affidavit to the petition. She instead chose to prosecute her case through written submissions.

The matter came to court variously until 3rd March, 2021 when the parties agreed on a disposal of the matter by way of written submissions.

In their elaborate written submissions dated 17th May, 2021 the Respondent raises 4 issues for determination as follows;

i) Whether the petitioners complied with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) practice and Procedure Rules, 2013?

ii) Whether the petition meets the constitutional threshold?

iii) Whether the Respondents violated the constitution of Kenya 2010 in carrying out the recruitment of the chiefs II and the Assistant Chiefs in Mbeere South Sub-county?

iv) Whether the petitioner is entitled to the reliefs sought in this petition?

The Respondent's case is that this petition is basically against the recruitment of candidates to the position of Chief II for Mbeti South, Kanjiru and Kinthuthuri locations. This being the case the subject matter is without the ambit of Article 162 and 165 (5) of the constitution of Kenya, 2010 as well as Section 12 of the Industrial Act, 2011. These clothe this court with jurisdiction and in the circumstances, this is wanting.

The Petitioner counters case in his written submissions dated 12th March, 2021. It is his case that the High Court at Embu caused a transfer of this matter to this court an appreciation that the court had the proper jurisdiction to hear and determine constitutional petitions arising from employment sector.

It is his further submissions that indeed, Article 162 (2) (a) and Section 12 of the Employment and Labour Relations Court Act clothe this

court with jurisdiction to hear and determine such matters.

The Petitioner in furtherance of a case sought to rely on the authority of **Judicial Service Commission vs Gladys Boss Shollei & Another (2014) eKLR** where the court held as follows;

“In this case, the respondent filed her petition in the Constitutional and Human Rights Division of the High Court and the same was properly transferred to the Industrial Court by the High Court as the violations alleged arose from the employment relationship. Accordingly, I would thus reject the contention that the Industrial Court had no jurisdiction to entertain the respondent’s claim.”

The jurisdiction of this court is determined by the constitution and statute. In both spectacles, this court is clad with jurisdiction to hear and determine all matters employment or relating or incidental to employment. This is the case here and therefore the issue of lack of jurisdiction is a non-issue. It does not exist and I so find.

The other issue for determination is whether the petition meets the constitutional threshold. It is the Respondent’s case that the petition is a violation of Rule 4 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) practice and Procedure Rules, 2013.

It is the Respondent’s case that the petitioner is in violation of Rule 4 (1) of Mutunga Rules which provides as follows;

“where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.

(2) In addition to a person acting in their own interest, court proceedings under sub rule (10) may be instituted by-

- i) a person acting on behalf of another person who cannot act in their own name;*
- ii) a person acting as a member of, or in the interest of, a group or class of persons;*
- iii) a person acting in the public interest; or*
- iv) an association acting in the interest of one or more of its members.”*

They also fault the petitioner for not making the necessary disclosures per Rule 10 (1) of the Mutunga Rules provide for requisite affidavits in support of the petition.

It is the Petitioner’s submission that the Mutunga Rules are a facilitator and define substance and form on petitions. They cannot therefore be used to frustrate and demolish the people’s quest for fundamental rights and freedoms.

The Petitioner’s case on this takes sway. The Mutunga rules are an enabler and not a stumbler to this realization of rights. Their intent is to explain, express and simplify process to allow parties to approach courts with ease in pursuance of their rights and freedoms. This is the case here and therefore the fallacy and failure of the Respondent’s submissions.

The 3rd issue for determination is whether the Respondents violated the Constitution of Kenya, 2010 in carrying out the recruitment of the chiefs II and the Assistant Chiefs in Mbeere South Sub-county. The parties again hold diametrical opposite positions on this.

The Respondent submits that in the recruitment process of Chiefs II and the Assistant Chiefs, the 1st Respondent applied the position of Article 73 (1) (2) of the Constitution which comes out as follows;

“73. (1) Authority assigned to a State Officer-

(a) is a public trust to be exercised in a manner that-

- i) is consistent with the purposes and objects of this Constitution;*
- ii) demonstrates respect for the people;*
- iii) brings honour to the Nation and dignity to the office; and*
- iv) promotes Public confidence in the integrity of the office; and*

(b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

(2) The guiding principles of leadership and integrity include-

- (a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;”*

(b) Objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practice.”

The Petitioner again counters the Respondent’s case and submits that the action of an opaque recruitment of these officers was unconstitutional *ab initio* and therefore should be overthrown.

The Petitioner has adduced evidence of an irregular recruitment of public officers without involving the public and other stakeholders. This is not acceptable in this era of a constitution democracy where the rule of law takes precedence. I therefore find a case for the petition and order relief as follows;

- i) A declaration that the recruitment process for the position of CHIEF II for Mbeti South, Kianjiru and Kithunthiri and posts for the Assistant Chiefs II Job Group “F” Gichiche sub location in Gichiche location, Gachuriri sub location in Mbeti South location and Wachoro sub location in Mbeti south location and Wachoro sub location in Karaba location be done in compliance with Article 10 of the Constitution.
- ii) That an order be and is hereby issued that Article 10 of the Constitution of Kenya, 2010 on the national values and principles of governance include (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people be applied in this recruitment process.
- iii) An order be and is hereby issued nullifying the appointment, recruitment and/or otherwise for the post of ASSISTANT CHIEF II Job Group “F” Gichiche sub location in Gichiche location, Gachuriri sub location in Mbeti south location and Wachoro sub location in Karaba location until the public has fully participated in the unveiling the characters of the said recruits as enshrined under the Constitution.
- iv) An order be and is hereby issued compelling the 1st Respondent to conduct a meaningful and open public participation process by allowing the Petitioner, residents of Mbeere South Sub-county, members of the public and other stake holders to present their views and or written memoranda touching on the integrity, suitability and competence of the shortlisted candidates for the posts of Chief II for the Mbeti south, Kianjiru and Kithunthiro locations and Assistant chief II Job Group “F” Gichiche sub location in Gichiche location, Gachuriri sub location in Mbeti south location and Wachoro sub location in Karaba location.

Dated and delivered at Nyeri this 23rd day of March, 2022.

D.K.Njagi Marete

JUDGE

Appearances

1. Miss Jerono instructed by Mutuma Gichuru & Associates Advocates for the Petitioner.
2. Mr.Silo instructed by State Law Officer for the Respondent.