



**Tome & another v Bungoma County Assembly Service Board (CASB) & 9 others;
Ethics and Anti-Corruption Commission (Interested Party) (Employment and Labour
Relations Petition E007 of 2021) [2022] KEELRC 1337 (KLR) (18 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1337 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS PETITION E007 OF 2021**

JW KELL, J

MAY 18, 2022

**IN THE MATTER OF THE ADVERTISED 55 JOB VACANCIES IN
THE COUNTY ASSEMBLY OF BUNGOMA IN CONTRAVENTION
OF ARTICLES 2,**

10,73,201,207 AND 232 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE ENFORCEMENT OF THE
CONSTITUTION OF KENYA, 2010 UNDER**

S. W. GITHOGORI (RM)

7.10.19

ARTICLES 3,10,22 &258

AND

**IN THE MATTER OF SECTION 4 (1&2) OF THE CONSTITUTION
OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS) PRACTICE**

AND PROCEDURE RULES, 2013

AND

**IN THE MATTER OF SECTIONS 102 AND 107 OF THE PUBLIC
FINANCE MANAGEMENT ACT, 2012**

AND

**IN THE MATTER OF REGULATIONS 25,42,43 AND 119 OF THE
PUBLIC FINANCE MANAGEMENT (COUNTY GOVERNMENTS)**



REGULATIONS 2015
RULING IN BUNGOMA ELR CAUSE NO. E007 OF 2021
AND
IN THE MATTER OF CONTRAVENTION OF THE FISCAL
RESPONSIBILITY PRINCIPLES

BETWEEN

FRANCIS SIMIYU TOME 1ST PETITIONER
GODWIN BARASA SITATI 2ND PETITIONER

AND

BUNGOMA COUNTY ASSEMBLY SERVICE BOARD (CASB) 1ST
RESPONDENT
SECRETARY OF THE BUNGOMA CASB 2ND RESPONDENT
CHAIRPERSON OF THE BUNGOMA CASB 3RD RESPONDENT
BEN KIPKUT (CASB MEMBER) 4TH RESPONDENT
GEORGE MAKARI (CASB MEMBER) 5TH RESPONDENT
RACHELLE KHISA (CASB MEMBER) 6TH RESPONDENT
ANTHONY MABELE (CASB MEMBER) 7TH RESPONDENT
NATIONAL TREASURY & PLANNING 8TH RESPONDENT
CONTROLLER OF BUDGET 9TH RESPONDENT
COMMISSION ON REVENUE ALLOCATION 10TH RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

RULING

1. The Applicant is the Petitioner in the instant Petition dated 2nd November 2021. The Ruling is on the Application dated 1st April 2021 seeking the following orders:-
 - a) That the Application be certified urgent and be heard ex-parte in the first instance.
 - b) That this Honourable court expedites the disposal of the petitioner's notice of motion filed on 22nd December 2021.
 - c) That in the alternative this Honourable court enters a default ruling in respect to the Petitioner's notice of motion filed 22nd December 2021.



Background to the Application

2. The Petitioner filed under Certificate of urgency of 22nd October 2021 undated Notice of Motion seeking a temporary conservatory order prohibiting the 1st Respondent or anybody acting under them for proceeding with recruitment whether internally or externally of the impugned 55 vacancies at the 1st Respondent.

The Petition dated 21.10.2021 was filed together with the Notice of Motion and seeks declaration that the recruitment and deployment of 55 persons without adequate budgetary allocation of funds is a violation of *the Constitution* and have breached various provisions of *the Constitution* of Kenya cited therein.

3. A declaration is also ought that the Respondents are jointly and severally unfit to hold any Public office in elective, appointment or selected/nominated capacity due to lack of integrity abuse of office and gross violation of constitution and enabling legislation.
4. An order is also sought that the Respondents have jointly or severally acted in a manner inconsistent with *the Constitution*.
5. On 2nd November 2021 the Applicant filed Certificate of Urgency with Application to be granted leave to amend the filed Petition. The court certified the application as urgent and allowed the amendments and listed the matter for 29th November 2021 for hearing directions . On 29th November 2021 the Petitioner and Counsel for 1st to 7th Respondent, interested Party, and 9th Respondent appeared before court for the said mention to give hearing directions. All Respondents and interested party told the court they had not been served with the amended pleadings by Petitioner. The court noted the amended pleadings were not in compliance with amendment rules under the Civil Procedure Rules. The court granted the Petitioner 21 days to regularize his amendments and serve. The Respondents were also were granted 21 days to file response. The court considered the lapse of time caused by improper pleadings by Petitioner and exercising its discretion for substantive justice to be done directed the matter to proceed for hearing of Petition directly.
6. It is the court's position that at that point the Petitioner ought to have objected or raised concern over his application but did not. On 21st December 2021 under vacation rules the Petitioner filed Motion seeking the following orders:- That the court be pleased to review or set aside its directive issued on 29th November 2021 in which it was not declined to hear and determine the Petitioner's Application.
7. The Petitioner states the grounds were based on mood of court yet the record is clear the court considered the Motion was not very different for petition. The decision as explained was on basis that there was lapse of time due to the Petitioner's failure to comply with amendment of pleadings rules. The Petitioner was also in court and did not raise any issue with the direction.
8. The Petitioner filed amended pleading in compliance with direction of 29.11.2021 on 22nd December 2021. The petitioner filed in court further affidavit in support of amended Petition dated 3.1.2022 .
9. The court directed application dated 22.12.2022 be heard interpartes on 20.1.2022. On that day Petitioner and counsel for Respondents appeared. The Petitioner indicated the purpose of the mention was to confirm compliance. The Petitioner confirmed receipt of response by 1st -5th Respondents and 9th Respondent and sought 14 days to file supplementary affidavit. Mr Tuti for the 9th Respondent sought leave to file investigations report which request was objected to by Mr. Makali. The 9th Respondent was granted leave of court to produce the report. The advocate for 1st to 7th Respondent was granted leave to file supplementary affidavit limited to the report by 9th Respondent. The court then gave 1st



March 2022 for pre-trial directions. The Petitioner all the while never bothered to raise his application dated 22.12.2022 which under certificate had been directed for hearing same date. The petitioner says the court never indicated procedure of hearing. The court has no case in court and does not descend to the arena in an adversarial system. It is upto the parties when they appear to raise their cases.

10. The parties appeared before the court again on 17th March 2022 with the Petitioner absent . I gave leave of filing further affidavit by Respondents and directions for filing of submission with mention on 22nd April 2022 to confirm compliance and issue judgement date.
11. On 31st March 2022 an Application under certificate by the Petitioner dated 30th March 2022 seeking leave to file supplementary response to the 3rd Respondent. Supplementary affidavit filed on 22nd March 2022. The court considered the said application and issued for direction of Application interpartes on 28th April 2022 and proceeded to vacate the date for mention to ensure submissions compliance and issue judgement date. On 28th April 2022 the Petitioner was absent. Counsel for 1st and 2nd respondent Mr. Murunga present indicted they had been served with submissions and requested for leave to file submissions to application dated 1st April 2022.

The Determination of the Application of 1st April 2022

12. The Respondent filed grounds of opposition dated 14th April 2022 in response to the Application. The grounds being:- the Application is frivolous vexatious and generally an abuse of the process of the Honourable court, It is an end into itself , it is bereft of any public interest, it is runs counter of the provision of Section 25 (1) 2,4 of the ELRC (Procedure Rules) 2016, Articles 159 (2) (b) (c)& (d) of *the Constitution* of Kenya.
13. The Application is canvassed by way of written submissions. The Petitioner's/Applicant submissions are undated and received in court on 25th April 2022 and the court considered the same. Most important is the submissions that the court decided fate of the amended Notice of Motion without hearing by proceeding to fix petition for hearing. The court noted that the petitioner was in court and even addressed the court and did not object for the court proceeding on the merit of the Petition. The record indicates that the court gave opportunity to the Petitioner to address the court on several occasions thereafter and he did not raise issue with the said direction. The record speaks for itself. Which record I have outlined above and has been repeated by the parties in their submissions.
14. The 1st to 7th Respondents have filed submissions dated 29th April 2022 with respect to the Application of 1st April 2022 and relies on the grounds of opposition dated 14th April 2022. The 1st -7th Respondents are opposed to the Application and outlines the background of the Application.
15. The Respondents rely on Section (3) of the ELRC Act which obliges parties and representatives to assist court to further the principal object of expeditious, efficient and proportionate resolutions of disputes and Article 159 (2) (b) and (d) to effect that Justice shall not to be delayed neither should not be festered by procedural technicalities. The ELRC (procedure) rules 2016 empower the court to give pretrial directions and case management directives . The court has considered the authorities cited and finds them persuasive.

Decisions

16. The court has carefully considered the submissions by both parties. The court is inclined to allow the application for the reason that justice ought to be seen to be done and the Petitioner who is a lay person, as he says, may not have understood the court case management processes. Ideally if not satisfied with



the hearing directions the Petitioner who was present in court should have objected instead of waiting to file an application later.

17. In allowing the Application, the court acknowledges that there is an error on face of the record though not raised by the Petitioner that in ordering for hearing of the Petition it did not add that the application to be heard together with the Petition. Consequently, the amended Notice of Motion filed on 2nd November 2021 was left hanging on record.

1st Decision and disposal of Application dated 1st April 2022

18. Considering the above findings , the Notice of Motion Application dated 1st April 2022 by the Petitioner/ Applicant is allowed to expedite disposal of the Notice of Motion dated 22nd December 2022. Costs in the cause.

2nd Decision and disposal of Application dated 22nd December 2021

19. Further, In the interest of justice and towards expeditions disposal, the court having noted the parties addressed the issues under the Notice of Motion Application dated 22nd December 2021 in their submissions; The court exercises judicial discretion towards substantive justice and makes the following order with respect to that application:-

- a) The application is allowed, the directions of the Court of 29th November 2021 are vacated.
- b) The amended undated Notice of Motion received in court on 2nd November 2022 to be heard first.
- c) Costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 18TH MAY 2022.

J. W KELI,

JUDGE.

In the presence of:-

Court Assistant:- Brenda Wesonga

Petitioner:-Mr Tome

Respondent:- Mr Murunga

