



REPUBLIC OF KENYA



KENYA LAW
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**Tome v Bungoma County Assembly & 5 others; Ethics and Anti-Corruption Commission
(Interested Party) (Petition E011 of 2021) [2022] KEELRC 1106 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1106 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
PETITION E011 OF 2021**

JW KELI, J

MAY 12, 2022

**IN THE MATTER OF THE UNLAWFUL AND UNCONSTITUTIONAL
APPOINTMENT OF THE 5 TH MEMBER OF THE BUNGOMA COUNTY
ASSEMBLY SERVICE BOARD**

**IN THE MATTER PURPORTED CONTRAVENTION OF ARTICLES
27,28,29,40,47,48,77,159 AND 182 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE ENFORCEMENT OF THE
CONSTITUTION OF KENYA, 2010 UNDER ARTICLES 3 (1),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 SECTION 9 (2) AS READ TOGETHER WITH THE
FIRST SCHEDULE OF THE COUNTY ASSEMBLIES SERVICES ACT 2017**

AND

**IN THE MATTER OF SECTIONS 5 (2) AND (3) OF THE EMPLOYMENT
ACT 2007 AND IN THE MATTER OF CONTRAVENTION OF
SECTION 22 (A) OF THE PUBLIC OFFICER ETHICS AT 2003**

BETWEEN

FRANCIS SIMIYU TOME PETITIONER

AND

BUNGOMA COUNTY ASSEMBLY 1ST RESPONDENT



**BUNGOMA COUNTY ASSEMBLY SERVICE BOARD (CASB) 2ND
RESPONDENT**

SECRETARY OF THE BUNGOMA CASB 3RD RESPONDENT

CHAIRPERSON OF THE BUNGOMA CASB 4TH RESPONDENT

ANTHONY MABELE (CASB MEMBER) 5TH RESPONDENT

TEACHERS SERVICE COMMISSION 6TH RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED PARTY

RULING

1. The Ruling is on the Notice of Preliminary Objection dated 23rd February 2022 by the 1st to the 5th Respondents to the amended to the Petition and based on the grounds that:-
 - (1) The Petitioner has no locus standi to bring this matter, as he never applied for impugned position to which the 5th Respondent was appointed and the Petitioner has now impugned in this petition; hence he has no demonstrated or reasonably demonstrable connection with the said impugned appointment the subject of this petition.
 - (2) It is because of his lack of locus standi, that he mischievously elected to disguise this matter as this matter as a constitutional Petition instead of filing it as an ordinary employment cause.
 - (3) The Petition is seriously conflicted and having a conflict of interest as he has been an employee of the Bungoma County Assembly who has been disciplined for indiscipline and integrity issues, who had never raised these grievances while in employment and before the disciplinary action against him – hence he has brought this petition maliciously in bad faith to hit at and settles scores with his employers the 1st and 2nd Respondents- hence he is in this honourable court with unclean hands and for malicious reason and ulterior motive, other than for the ends of justice.
 - (4) The substratum and gravamen of the Petitioner’s grievances as set out in the petition is such that is outside the scope of a constitutional petition in terms of Article 23 of the Kenya Constitution 2010 as no Constitutional right of his in Bill of Rights has been violated.
 - (5) An alleged infringement or non-compliance with statutory laws other than the Constitution should be addressed by an ordinary suit (ordinary litigation) and not a constitutional Petition (Constitutional Litigation)
 - (6) This matter is not justiciable as in terms of Section 77 (1) and (2) of the *County Governments Act* (Act No. 17 of 2012) dissatisfied or affected by such appointment he should Appeal to the Public Service Commission.
 - (7) This matter is also unripe as the petitioner has neither pursued nor exhausted the legally prescribed avenues of redress of appealing to the Public Service Commission.
2. The Objector (the 1st to 5th Respondents) filed written submissions dated 3rd March 2022 with respect to the Notice of Preliminary Objection.



3. The Petitioner filed undated written submissions received by the court on the 14th March 2022 in opposition to the Notice of Preliminary Objection.
4. The Notice of Preliminary objection is canvassed by way of written submissions.

Determination

5. The crux of the Notice of Preliminary Objection is on the following issues:-
 - (a) Whether the Petitioner has locus standi to bring the instant petition.
 - (b) Whether the Petitioner suffers conflict of interest.
 - (c) Whether the grievances qualified to be raised as constitutional petition under Article 22 of *the Constitution*.
 - (d) Whether the court lacks jurisdiction pursuant to Section 77 of the *County Governments Act* as read together with Section 87 of the Public Service Commission Act.

(a) Whether the Petitioner has locus standi to bring the instant Petition.

6. The Objector submits that the Petitioner never applied for the impugned position to which the 5th Respondent was appointed, the subject of the petition. It is for this reason he brought a Constitutional Petition instead of an Employment suit.
7. The Petitioner in response submits that *the Constitution* largely removed the doctrine of locus standi to enhance access to justice. That Articles 22 and 258 of *the Constitution* of Kenya grants every Kenyan the right to move the court on Public Interest whenever a Bill of Right is violated or threatened. The Petitioner submits that he cited the 1st Respondent for abusing its constitutional legislative authority under Article 185 of *the Constitution* by procedurally approving the nomination of the 5th Respondent as a member of the County Assembly in contravention of Article 77 (2) of *the Constitution*. The Petitioner avers that the Respondents were mandatory required to rely on Section 9 (2) of the County Assemblies Services Act 2017 and not Section 10 (2) of the Public Appointments (County Assemblies Approvals) Act No. 5 of 2017. The Petitioner submits that he is enforcing the Bill of Rights in the Public interest and to buttress his submissions relies on the decision of the court in M/S Priscilla Nyakabi Kanyua -vs Attorney General & Interim Independent Electoral Commission in Nairobi HCCP No. 1 of 2010 as cited in J. Harrison Kinyanjui -vs- Attorney General & Another (2016) eKLR where the court among others noted that any person acting in good faith may approach the court to seek judicial intervention to ensure the sanctity of *the Constitution* of Kenya is protected and not violated. As part of reasonable , fair and just procedure to uphold the Constitutional guarantees, the right to access justice entails a liberal approach to the question of Locus standi.
8. The court is persuaded by the foregoing authority and finds that the Petitioner has locus standi to bring the instant petition despite not having applied for the impugned position held by the 5th Respondent. Whether or not the Petition has merit is an issue that the court may determine on considering the petition on merit.

(b) Whether the petitioner suffers conflict of interest.

9. The Objector submits that the Petitioner is seriously conflicted and has serious conflict of interest as he has been an employee of the Bungoma County Assembly which has been disciplined him for disciplinary and integrity issues, and had never raised these issue while in employment and before the disciplinary action against him hence the instant petition is brought maliciously and in bad faith to



hit at and scores with his employers – 1st and 2nd Respondents hence in a court with unclean hands, malicious and ulterior motives other than ends of justice. He is not acting in good faith or Public Interest as he alleges.

10. The Petitioner in response submits that a preliminary objection can only be raised on pure question of law. That it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. That the Petitioner filed instant Petition on 12th November 2021 while the administrative action of dismissal against him was on 8th February 2022. That the Petition raises fundamental questions of contravention of *the Constitution* and the court's inquiry cannot be limited to alleged unclean hands of the Petitioner.
11. The court agrees with the submissions of the Petitioner and finds and determines that the alleged conflict of interest is not a proper ground for preliminary objection.

(c) Whether the grievances qualify to be raised as a constitutional petition under Article 22 of the Constitution.

12. The Petitioner submits that the substratum and gravamen of the Petitioner's grievances as set out in the Petition is such that is outside the scope of a constitutional petition in terms of Articles 23 of *the Constitution* of Kenya 2010 as no constitutional right of his in the Bill of Rights has been violated. The objector submits that an alleged infringement or non-compliance with statutory provisions other than *the Constitution* should be addressed by an ordinary suit (ordinary litigatio) and not a Constitutional Petition.
13. The Petitioner in response submits it has drawn the court's attention and cited 1st Respondent for abusing its constitutional legislative authority. Under Articles 185 of *the Constitution* as read together with Section 14 (3) of the *County Governments Act* 2012 by procedurally approving the nomination of the 5th Respondent as a member of the Bungoma County Assembly Service Board contrary to Article 77 (2) of *the Constitution*.
14. The court finds and determines that this is not a proper point or question to be brought under preliminary objection.

(d) Whether the Court lacks jurisdiction pursuant to Section 77 of the County Government Act as read together with Section 87 of the Public Service Commission.

15. The Objector submits that a person dissatisfied with the appointment should appeal to the Commission under Section 77 of the *County Government Act*. That the Petitioner ought to exhaust that procedure before seeking court intervention.
16. The Petitioner submits that the Respondents have misapprehended and misapplied *the Constitution* and the law. That the instant petition is a constitutional petition and therefore the Petitioner is not statutorily obliged to first exhaust the existing alternative dispute resolution mechanisms prescribed at Section 77 of the County Government Act, 2012, and that only the court of law has constitutional authority to interpret *the Constitution* and laws enacted by the National Parliament.
17. The Petition, under part B paragraph (1)(i) states"- "That vide an advertisement in standard newspaper dated 20th October 2017, the 2nd Respondent invited members of the public to apply for consideration to the vacant positions of the 4th & 5th Respondents of the Bungoma County Assembly Service Board." The 2nd Respondent in the instant Petition is the Bungoma County Assembly Service Board.



18. At Paragraph 9 of the grounds of the Petition, it is stated;-“That the decision by the 2nd Respondent to re-submit the names of the 5th Respondent to 1st Respondent for approval of his nomination to the position of the 5th member of the 2nd Respondent was also contrary to provisions of Section 22 (a) of the Public Officers Ethics Act 2021.”
19. The court finds and determines the gravamen of the instant petition is- challenge to the recruitment process leading to the appointment of the 5th Respondent. The decision of the 2nd Respondent led to the Appointment. Consequently the Section 77 (2) of the County governments Act 2012 applies.
20. The court in several decisions and the court of Appeal have determined and interpreted the provisions and application of Section 77 of the County Governments Act to effect that any challenge to decision of the 2nd Respondent on recruitment process in the county government must in the first instant be appealed to the Public Service Commission before court intervention. To buttress its submissions under this issue the Respondent/Objector relies on decision of the court in Muswahili Laditema -vs Vihiga County Public Service Board & Others (2021) where the court upheld the decision of the court of Appeal in Secretary County Public Service Board - vs- Hulbai Gedi Abdille (2017) eKLR where the court held as follows:-

“There was no doubt that the Respondent initiated the Judicial Review Proceedings in utter disregard to the dispute resolutions mechanism availed by Section 77 of the Act. The Section provides not only forum through which the Respondent could agitate her grievance at first instance but the jurisdiction thereof is a specialized one specifically tailored by the legislation to meet needs such as the Respondent’s. 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 process in the first instance”.

21. In that case the court held the decision of court of Appeal on the Applicability and interpretation of Section 77 of the County Government Act is binding on this court. The court agrees with that decision and upholds the court of Appeal decision that the instant Petition is brought prematurely to this court, that the court has no jurisdiction under Section 77 of the County Government Act to deal with challenge of recruitment decision emanating from the 2nd Respondent in the first instance.
22. The court without jurisdiction must down its tools. The court determines that it has no jurisdiction. The Preliminary Objection dated 23rd February 2022 is upheld on ground of lack of jurisdiction.
23. The amended Notice of motion and the instant Petition dated 19th November 2021 are struck out for failure by the Application /Petitioner to exhaust in the first instance the appellate mechanism established under Section 77 of the County Government Act as read together with Section 87 (2) of the Public Service Commission Act.
24. Each party to meet its own costs.

DATED , SIGNED AND DELIVERED AT BUNGOMA THIS 12TH DAY OF MAY 2022.

J. W. KELI

JUDGE

In the Presence of :-

Court Assistant : Brenda Wesonga

Petitioner: Tome



1st – 5th Respondents:- Prof Sifuna

6th Respondent : Mr Ochieng

