



REPUBLIC OF KENYA



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Gitau & 2 others v Lamu County Public Service Board & another (Constitutional Petition E005 of 2021) [2022] KEELRC 1741 (KLR) (23 June 2022) (Judgment)

Neutral citation: [2022] KEELRC 1741 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
CONSTITUTIONAL PETITION E005 OF 2021

BOM MANANI, J

JUNE 23, 2022

**IN THE MATTER OF ARTICLES 2, 10, 27, 43, 162, 190, 201,
232, 235 AND 258 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTIONS 55, 57, 60, 62 AND
63 OF THE COUNTY GOVERNMENT ACT 2012**

AND

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

AND

**IN THE MATTER OF SECTIONS 3, 4, 5, 7 AND 11 OF
THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

AND

**IN THE MATTER OF REGULATION 25 OF THE PUBLIC FINANCE
MANAGEMENT (COUNTY GOVERNMENTS) REGULATIONS, 2015**

AND

**IN THE MATTER OF THE CONTRAVENTION OF FISCAL RESPONSIBILITY
PRINCIPLES BY THE COUNTY GOVERNMENT OF LAMU**

BETWEEN

DUNCAN KARIUKI GITAU 1ST PETITIONER

ISHAQ ABUBAKAR MOHAMED KHATIB 2ND PETITIONER

RAPHAEL GACHANJA NJENGA 3RD PETITIONER

AND



JUDGMENT

Introduction

1. This is a Petition by the three Petitioners, all residents of the County of Lamu challenging the decision by the 1st Respondent to recruit staff for the 2nd Respondent as advertised in the Daily Nation of September 24, 2021. The challenge against the process is fourfold: that the offices in respect of which the proposed recruitment is intended have not been established by the Respondents in accordance with the applicable law; some of the proposed appointments will exceed the available positions as by law created; some of the proposed recruitments relate to offices in respect of which there is no vacancy; and the effect of a successful recruitment will be to further bloat the human resource portfolio of the 2nd Respondent beyond the budgetary ceiling set by law.
2. Consequently, the Petitioners pray that the entire process be declared as contrary to law, null and void. They also beseech the court to issue orders quashing the exercise and prohibiting the Respondents from carrying on with the process to its conclusion.
3. The Respondents have opposed the Petition. In their view, the Petition is without merit as the proposed recruitment is in line with the law. Consequently, the Respondents ask that the Petition be dismissed with costs.

The Petitioners' Case

4. First, according to the Petitioners, although section 62 of the [County Governments Act](#) (CGA) entitles the 1st Respondent to establish office in service of the 2nd Respondent or indeed abolish such office, this process must follow a particular procedure prescribed by statute. Under section 62(2) of the CGA, the 1st Respondent must submit the proposal to establish or abolish such office to the County Assembly of the 2nd Respondent for approval. It is only after the County Assembly has approved the process that the office shall be lawfully established or abolished.
5. As would be expected, any office established or abolished in county public service has to be housed under a department within a County Government. As such, the 1st Respondent is required by law to seek the views of the County Chief Officer of the department affected by the proposed creation or abolition of office before the proposal is submitted to the County Assembly.
6. The Petitioners argue that the 1st Respondent did not follow this procedure before advertising the several vacancies aforesaid. In effect, the advertisement was run before the offices were established in accordance with the law.
7. Second, the Petitioners argue that the 2nd Respondent, by law has only two Sub Counties, Lamu East and Lamu West. Therefore, it can only have two Sub County administrators.
8. Further, it is the Petitioners' case that as the position of Sub County Administrator is statutory the occupant of the office cannot be redeployed except in the capacity of a Sub County Administrator. Thus the purported redeployment of one of the 2nd Respondent's Sub County administrators to another department within the 2nd Respondent's human resource portfolio before the advertisement of 24th September 2021 was of no legal effect. In the Petitioners' view, the Sub County office from



- which the officer was moved never fell vacant. Therefore, the purported advertisement for vacancies for three Sub County administrators was contrary to law null and void.
9. Third, it is the Petitioners' case that under article 179 (3) (a) of *the Constitution*, membership of the County Executive Committee (CEC) of a County Government should not exceed one third of the membership of its County Assembly if the County Assembly has less than 30 members. Accordingly, the 2nd Respondent having 18 County Assembly members can only have up to 8 County Executive Committee Members (CECMs).
 10. In the Petitioners' view, every Chief Officer in a County Government serves under a particular County Executive Committee Member (CECM) with each CECM having one Chief Officer. Therefore, as the 2nd Respondent has 8 CECMs, it can only have a maximum of 8 Chief Officers. Thus, the recruitment of 13 Chief Officers by the 1st Respondent was contrary to *the Constitution* and the law and therefore null and void.
 11. Fourth, the Petitioners contend that the position of Ward Administrator is a statutory one. As such, persons appointed to this office cannot be lawfully redeployed to other offices within the County Government. Therefore, the purported redeployment of the several Ward Administrators by the Respondents to other departments before purporting to advertise vacancies for the Ward offices was null and void. In other words, it is the Petitioners' case that as the redeployment of the affected Ward Administrators never took effect in law, the Ward Administrator offices never fell vacant to require filling through the advertisement of 24th September 2021.
 12. Finally, the Petitioners argue that the law caps recurrent expenditure of a County Government in employee compensation in wages and other benefits to 35% of its total revenue resource base in any given year. It is the Petitioners' case that the 2nd Respondent's recurrent expenditure in this respect for the first nine months of the financial year 2020-2021 was already at 65.9% of its budget. Therefore, the proposed recruitment would not only bloat the staff portfolio of the 2nd Respondent but also further violate the fiscal capping provided by law.
 13. Therefore, the Petitioners pray that the court finds the proposed recruitment violates of *the Constitution* and law. They pray for various declarations in this regard. They also pray for quashing of the process and for further orders prohibiting the Respondents from concluding the process.

Respondents' Case

14. For the Respondents, they contend that the Petition is an abuse of the court process. They argue that the court has no jurisdiction to entertain it as it discloses no cause of action and is filed in contravention of sections 15 and 88 of the CGA.
15. According to the Respondents, the 1st Respondent did not establish or seek to abolish any of the impugned offices in September 2021 in exercise of its powers under section 59 of the CGA. All the offices to which the proposed recruitment relates were already in existence having been established much earlier. As such, there was no requirement for the 1st Respondent to seek approval of the County Assembly of Lamu before advertising the various positions in the notice published on September 24, 2021.
16. It is the Respondents' case that the proposed recruitment was meant to either fill vacant positions left by departing officers or increase the number of officers in already existing departments. This was all in a bid to enhance service delivery to the people of Lamu.



17. Whist acceding to the Petitioners' contention that the law obligates County Governments to limit their budgetary allocation on wages to 35% of their annual revenue, the 1st and 2nd Respondents contend that the 2nd Respondent has always upheld this principle. The Respondents deny that the 2nd Respondent's expenditure on wages and other benefits for its employees in the first 9 months of the financial year 2020-2021 stood at 65.9% of its total revenue for the year as suggested by the Petitioners. The Respondents argue that contrary to the Petitioners' assertions, the 2nd Respondent has consistently committed at least 30% of its total annual budget to development projects within the County.
18. In the Respondents' view, the proposed recruitment is in line with *the Constitution* and the law. It is the Respondents' case that the Petition is frivolous and does not disclose any constitutional violations that warrant the court's intervention.
19. The Respondents argue that if the court grants the orders sought, it will in the process disrupt service delivery to the people of Lamu. In the Respondents' view, such orders will only cripple the 2nd Respondent's mandate in law and conversely affect the constitutional dictate to facilitate devolved government. Consequently, the Respondents urge the court to dismiss the Petition with costs.

Issues for Determination

20. The parties did not file agreed issues at the pretrial stage. However, they did frame their version of issues in their final submissions. As framed by the parties, the issues are not necessarily in agreement.
21. From the viewpoint of the court, the following are the issues for determination: -
 - a. Whether the court has jurisdiction to hear this Petition.
 - b. Whether the positions sought to be filled through the advertisement of September 24, 2021 required establishment in terms of sections 61 and 62 of the CGA.
 - c. If the answer to b) above is in the affirmative, whether the 1st Respondent complied with sections 61 and 62 of the CGA in establishing the positions.
 - d. Whether some of the Ward Administrator positions advertised in the notice of September 24, 2021 related to offices which were, in law, not vacant.
 - e. Whether one of the Sub County Administrator positions sought to be filled through the advertisement of September 24, 2021 was a nonexistent devolved county unit in law and whether the other had not fallen vacant.
 - f. Whether the 1st Respondent can recruit Chief Officers that outnumber the existing CECMs in the County.
 - g. Whether the totality of the proposed recruitment will be in violation of the fiscal capping on budgetary allocations to recurrent expenditure on wages and other benefits for employees in service of the 2nd Respondent.
 - h. What are the appropriate orders in the cause?

Analysis and findings

22. The first issue relates to whether the court has jurisdiction to hear this Petition. Although the Respondents contested the court's jurisdiction to hear the Petition, this matter was not pursued to its logical conclusion. On the contrary, the Respondents' counsel in his final submissions to court appears



- to have changed tact on the issue and conceded the court's jurisdiction. Nevertheless, since the question of jurisdiction is a point of law, it is important that it is addressed as the first question for determination.
23. First, the dispute before the court relates to the mandate of the 1st Respondent to carry out the recruitment process commenced through the advertisement in the Daily Nation of September 24, 2021. In effect, it is a dispute touching on employment. This is a matter which squarely falls within the purview of the mandate of the court in terms of section 12 of the *Employment and Labour Relations Court Act*. And by virtue of rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016, these proceedings may be commenced by way of a constitutional petition.
 24. Second, under article 258 of *the Constitution*, anyone has the right to invoke the court's jurisdiction to protect provisions of *the Constitution* where they are violated or threatened with violation. If I understand them correctly, the Petitioners argue that the decision by the Respondents threatens to violate a series of constitutional provisions including those on devolution, national values and public finance. In my view therefore, the Petition is well founded and the court has jurisdiction to entertain it.
 25. Third, sections 15 and 88 of the CGA only grant members of the public the right to petition a County Assembly and or County Executive of any County on any matter that is of concern and which falls within the mandate of the organ of the County so petitioned. However, the provisions do not make it a prerequisite for the public to petition either the County Assembly or Executive on such matters before approaching the court for redress. In effect, the exhaustion principle has no application in this respect.
 26. I will combine issues numbers two and three. On this, the following are my observations.
 27. Section 59 of the CGA empowers the County Public Service Board (CPSB) of a County Government to establish and abolish office in county public service. The CPSB is also empowered to appoint persons to serve in such office and to generally maintain disciplinary control over such employees. It does this on behalf of the relevant County Government for which it was created.
 28. Although it may on its own motion move to establish or abolish office in county public service of a County Government, it is nevertheless desirable that the CPSB gets a written request in this respect by the head of the county department that is in need of the office. This is evident from the provisions of sections 61 and 62 of the CGA. The rationale for this is that whatever the decision, it must be demonstrated that it is in public interest in terms of section 60 of the CGA.
 29. Once a decision is taken to establish or abolish an office in county public service, the CPSB must seek the sanction of the County Assembly. The request is channeled through the CEC for county public service. Before submitting this request to the County Assembly, the CPSB must have taken the views of the Chief Officer of the affected department on board.
 30. The Petitioners argue that the 1st Respondent did not lawfully establish the various offices in respect of which it seeks to appoint personnel through the impugned advertisement. As a result, the appointments are in violation of the law.
 31. On their part, the Respondents argue that the offices in question were already in existence at the time they were advertised. That these offices had earlier on either been regularly established as per the procedure set out above and obtained the approval of the Salaries and Remuneration Commission or had been inherited under the transitory mechanism provided for under *the Constitution* and the *Transition to Devolved Government Act*, 2012. That in the former case, the 1st Respondent was simply replacing officers who had either quit employment or retired or it was simply supplementing hitherto inadequate staff in the various departments. That in the latter case, the 1st Respondent was only



- filling vacancies left by officers who had been seconded to the 2nd Respondent under the transition arrangement and who had since either retired or been recalled.
32. I have carefully studied the provisions of the *Transition to Devolved Government Act*, 2012. This statute does not make provision for establishment of offices in county public service. All it does is to make provision for the transfer of functions, assets and where appropriate liabilities from the national government to county governments. It also contemplates allocation of staff previously shared between the local and national governments.
 33. Except where the law states otherwise, the function of setting up or abolishing office in county public service is the preserve of the CPSBs undertaken in terms of the procedure set out under the CGA. I do not therefore agree with the Respondents' view that the mere fact of working with staff seconded to the 2nd Respondent by national government relieved them of the obligation to establish offices the 2nd Respondent required in order to deliver services to its people. It was the function of the 1st Respondent to establish the relevant offices in terms of the provisions of the CGA before allocating officers seconded by the Transition Authority to the said offices.
 34. As demonstrated above, section 59 of the CGA entrusts the 1st Respondent with the statutory mandate to establish or abolish office in county public service. Under section 62 of the CGA, this function can only be undertaken with the concurrence of the County Assembly of the County.
 35. Although the Respondents argue that they established some of the offices that are the subject of the notice of September 24, 2021 and inherited others under the transition mechanism, there is no evidence that was placed before the court to demonstrate that : -
 - a. Either the various departments housing the impugned offices ever requested the 1st Respondent to establish the offices in terms of section 61 of the CGA;
 - b. Or the 2nd Respondent moved on its own motion in terms of section 62 of the CGA to establish the various offices;
 - c. And the approval of the County Assembly of Lamu was sought and granted.
 36. The Respondents argue that the Petitioners have not provided evidence to demonstrate that the offices have not been established in accordance with the law as they assert. In the Respondents' view, since it is the Petitioners who make this assertion, the legal and evidential burden lies with them to establish the fact of noncompliance in terms of the law on burden of proof. In the Respondents' view, the Petitioners have not discharged this burden.
 37. In making this argument, the Respondents place reliance on the provisions of sections 107, 108 and 109 of the *Evidence Act* which place the legal and evidential burden of proof on the party making a positive assertion of a disputed fact to prove it. For further insights on this, one can look at Ahmed Mohammed Noor v Abdi Aziz Osman [2019] eKLR.
 38. On their part, the Petitioners, relying on the provisions of section 112 of the *Evidence Act* to submit that since the question whether the 1st Respondent undertook the procedure under section 62 of the CGA to establish the impugned offices is a matter that is within the special knowledge of the 1st Respondent, the burden lies with the 1st Respondent to provide evidence that it complied with the legal requirements of establishing the offices if it takes the position that it did. This position finds support in a number of judicial pronouncements (see for instance Kenya Power & Lighting Company Limited v Pamela Awino Ogunyo [2015] eKLR).



39. I agree with the position taken by the Petitioners that whether the 1st Respondent had established the impugned offices in line with sections 59, 61 and 62 of the CGA is a matter that lies within the special knowledge of the 1st Respondent. This provides an exception to the general rules on allocation of burden of proof under sections 107 to 109 of the *Evidence Act*. As the Respondents have special knowledge of these facts, they are in terms of section 112 of the *Evidence Act*, to prove compliance. Despite the contention by the Petitioners that these offices were not established in line with the provisions of the CGA and despite the assertion by the Respondents that they had established the offices in line with the law, it is noteworthy that the 1st Respondent did not furnish the court with proof of compliance with the provisions of the CGA in establishing the offices. And neither did the 2nd Respondent.
40. All that the Respondents provided were: correspondence between them and the SRC on the various offices; correspondence relating to severance of the relation between the Respondents and departing employees for various reasons; and Job Manuals for various positions. Whilst these documents may evidence the presence of the offices at the time of the correspondence, they are not evidence of the establishment of the offices. As a result, the question whether the offices were established in line with the CGA is not answered by the correspondence.
41. In the absence of evidence that the 1st Respondent complied with the requirements of sections 61 and 62 of the CGA in setting up the impugned offices, it can only be construed that most of them exist unlawfully. This is particularly so that the *Transition to Devolved Government Act*, 2012 does not envisage the Transition Authority as having the power to establish offices on behalf of County Governments.
42. However, as I mention above, the foregoing declaration only affects some but not all of the impugned offices. Some of these offices are established by the law. As a result, they do not require action by the CPSB to come into existence. These include: the office of Sub County Administrator established under section 50(1) of the CGA; the office of a Ward Administrator established under section 51 of the CGA; and the office of County Chief Officer established under section 45 of the CGA.
43. Consequently, it is declared that except for the offices of County Administrator, Ward Administrator and County Chief Officer which are creatures of statute, all the other offices in the advertisement in the Daily Nation of September 24, 2021 are by law to be established by the 1st Respondent in terms of the procedure set out under sections 61 and or 62 of the CGA. It is further declared that there is no evidence that the 1st Respondent followed the procedure aforesaid in establishing these offices.
44. The fourth issue is whether some of the Ward Administrator positions advertised in the notice of September 24, 2021 related to offices which were, in law, not vacant. In the evidence presented in court, the Petitioners state that the 2nd Respondent has 10 Wards run by 10 Ward Administrators. Further, the Petitioners state that all the vacancies in the office of Ward Administrator (with the exception of one) were generated after the Respondents purported to re-designate the occupants of the offices to other departments within the County.
45. It is the Petitioners' case that since the office of Ward Administrator is statutory, an individual appointed to it cannot be re-designated except if he is moved from one Ward to the other in the same position of Ward Administrator. Therefore, to the extent that the Respondents moved the Ward Administrators for the affected Wards to other positions other than Ward Administrators, all those transfers were illegal and null from commencement. They were of no legal effect. Consequently, although the offices may in fact be vacant, they in law are not vacant. As a result, it was wrong to treat them as vacant and purport to advertise the positions in the Daily Nation of September 24, 2021.



46. This position is contested by the Respondents who have provided evidence to demonstrate that there were at least five (5) vacant positions of Ward Administrators. These include Wards initially served by: Abaraufa Abaraufa Dido who is now an administrator at the 2nd Respondent's transport department; Fartun Abdulnasir Abdi who has been serving as Ward Administrator even though she was hired as Administrator; Fatuma Araphat Abdallah who has since been appointed as a CEC; Dominic Maina Mwangi who has been redeployed to serve as an administrative officer in the department of tourism; and Khalifa Bwanamaka Khalifa who has been redeployed as an administrative officer in the department of public service management and administration.
47. As pointed out earlier, Ward Administrators are appointed under section 51 of the CGA. Whilst the section provides for their appointment, it does not insulate them from redeployment to other positions within the County. Similarly, it does not provide for the general disciplinary control of these officers.
48. In the absence of these express provisions one has to look elsewhere in the Act to determine the management and disciplinary control over these officers. The provisions that are of relevance in this respect run from sections 59 to 72 of the CGA.
49. The totality of the various provisions is that: the CPSB has overall disciplinary and management control over county public service officers including Ward Administrators; the CPSB has power to redeploy all such officers including Ward Administrators except as contemplated under the Act; and that as long as the redeployment is with the consent of the affected employee and is not to the disadvantage of an officer, it is lawful.
50. Having regard to the foregoing, I find no basis for submitting, as the Petitioners do, that the Ward Administrators were improperly redeployed. There is no evidence that the law prohibits such movement of staff within the County. Similarly, there is no evidence that the redeployment was to the disadvantage of the affected staff and without their consent.
51. Having said thus, I note from the evidence tendered that out of the 5 Ward Administrators specifically mentioned only 4 were redeployed. Fartun Abdulnasir Abdi who was said to have been hired as Administrator was apparently still in office at the time the advertisement of September 24, 2021 was run. The only justification given by the Respondents in seeking her replacement even as she still served is that she was not hired as a Ward Administrator.
52. I have looked at annexure JM B on the Replying Affidavit by John Mburu dated October 27, 2021. This is the letter of appointment of Fartun Abdulnasir Abdi. It indicates that she is appointed as Administrator on permanent and pensionable terms. Of interest are her terms of engagement. Her salary range was to lie between Ksh. 48,190 to Ksh. 65,290. She was said to be in job group N. Instructively, these are the same terms that were offered to Dominic Maina Mwangi Khalifa Bwanamaka Khalifa and Fatuma Araphat Abdallah (see JM C, JM D on the Replying Affidavit of John Mburu dated October 27, 2021). These striking similarities in the letters of appointment lead me to believe that Fartun Abdulnasir Abdi was in actual fact engaged as a Ward Administrator notwithstanding that the letter of appointment describes her only as an Administrator.
53. Importantly, section 69 of the CGA appears to forbid the deployment of persons into an office which is not vacant. In my view this includes forbidding the hiring of staff to an office which is not yet declared vacant. For this reason, I hold the view that the Respondents could not lawfully advertise the position occupied by Fartun Abdulnasir Abdi while she was still in office. In similar vein, the Respondents could not advertise the positions of the other 5 Ward Administrators before re-deploying the occupants of those offices on promotion as argued by the Respondents.



54. Accordingly, it is my view that the Respondents' advertisement of September 24, 2021 in respect of the position of Ward Administrators was valid only in respect of 4 out of the 10 Ward Administrator positions. The advertisement in respect of the 6 other purported vacancies for Ward Administrator was issued in relation to Ward Administrator positions that were not vacant. It was therefore done unlawfully.
55. The fifth issue is whether one of the Sub County Administrator positions sought to be filled through the advertisement of September 24, 2021 was a nonexistent devolved county unit in law and whether the others had not fallen vacant. The Petitioners state in their evidence that the 2nd Respondent has only two Sub Counties that relate to the devolved structure of government: Lamu East and Lamu West. That these Sub Counties follow the boundary of the two constituencies that form the County of Lamu.
56. That in terms of the law, the number of constituencies in a County directly determines and corresponds with the number of Sub Counties. That the so called Lamu Central Sub County is a creation of the national government which is not part of the devolved government. Consequently, the advertisement of September 24, 2021 in respect of three positions of Sub County Administrator is unlawful.
57. On their part, the Respondents state that the 2nd Respondent has three Sub Counties: Lamu East, Lamu West and Lamu Central. That Lamu Central was established by the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government through Gazette Notice No. 7408 of August 2, 2017.
58. In response the Petitioners state that the Lamu Central Sub County created by Gazette Notice No. 7408 is an administrative unit for the national government having been established under the *National Government Co-ordination Act*, (Act No. 1 of 2013) (NGCA). It is their position that section 14 of the Act entitles the national government to establish administrative units in a County but solely for purposes of running national government programs. As a result, Lamu Central cannot be considered as a Sub County for purposes of the devolved government.
59. Under Article 6 of *the Constitution*, the national and county governments are considered as distinct but interdependent. In practical terms, the totality of the 47 counties comprises the geographical space that constitutes the national government. *The Constitution* therefore obligates the national government to ensure reasonable access to its services in all parts of the Republic that constitutes the 47 Counties. It is with this in mind that section 14 of the NGCA was enacted.
60. Article 176 (2) of *the Constitution* of Kenya 2010 requires every County Government to decentralize its functions and services to the extent that is efficient and practicable. In line with this, Part VI of the CGA, which addresses further decentralization in Counties, was enacted.
61. Under section 48(1) (b) of the CGA, Sub Counties are equivalent to the constituencies within the County established under Article 89 of *the Constitution*. The 2nd Respondent has two (2) constituencies: Lamu East and Lamu West. Therefore, in terms of section 48 of the CGA, it can only have two (2) Sub Counties for purposes of the devolved government.
62. From the evidence that was tendered, the third (3) Sub County (Lamu Central) was established as a unit of and exists for purposes of serving the national government and in line with the NGCA it is to be staffed by the national government. Indeed, this should explain why all the ten (10) Wards in the County of Lamu fall either in Lamu East or Lamu West. Lamu Central has no Ward attached to it. It



is therefore clear to me on the material placed before me that the Respondents are not entitled by law to appoint a Sub County Administrator for Lamu Central.

63. With respect to the other two Sub Counties, Lamu East and Lamu West, the Petitioners conceded in cross examination that the offices of the Sub County Administrators were in fact vacant at the time the advertisement of September 24, 2021 was run. One of the administrators' contracts lapsed in June 2019 and was not renewed (see JM 4(b)). The other Sub County Administrator was in March 2018 transferred to the 2nd Respondent's department of health.
64. By virtue of section 50(1) of the CGA, these two Sub Units are to be manned by one Sub County Administrator each. Absent evidence to demonstrate that the positions are occupied, the court cannot bar the 1st Respondent from taking steps to make appointments in respect of the two.
65. As pointed out earlier on in this judgment, the position of Sub County Administrator is statutory. It neither requires establishment by the 1st Respondent nor does it require the approval of the County Assembly of Lamu for its validity.
66. Although the Petitioners have argued that the position of Sub County Administrator being a statutory one, officers appointed to this office cannot be redeployed to other positions by the 1st Respondent, there is nothing in the law to support this position. On this aspect, I reiterate my arguments in paragraphs 47 to 50 of this judgment on the position on redeployment of Ward Administrators in respect of the Sub County Administrator deployed to the 2nd Respondent's department of health. In my view the redeployment was validly done.
67. Consequently, the court finds that whilst the Petitioners have established that hiring a Sub County Administrator for Lamu Central Sub County would be in contravention of the law, they have failed to demonstrate that hiring of Sub County Administrators for Lamu West and Lamu East Sub Counties is irregular. In the court's view, the Sub County Administrator position of Lamu Central sought to be filled through the advertisement of 24th September 2021 is, in law, nonexistent as a devolved county unit. It only exists as a central government administrative unit.
68. The sixth issue is whether the 1st Respondent can recruit Chief Officers that outnumber the existing CECMs in the County. Chief Officers are appointed under section 45 of the CGA to be in charge of a department under a particular CECM. Section 46 of the CGA empowers the County Executive Committee to constitute county departments in accordance with the specific needs of a given County Government. Under section 46(1) (b) of the CGA, the County Executive Committee has the power and discretion to determine the nature and number of departments to be set up.
69. Clearly, it is the number of departments set up in a County under section 46 of the CGA but not the number of CECMs that determines the number of Chief Officers to be appointed by the County Executive Committee. Therefore, the argument by the Petitioners that the number of Chief Officers must be equal to that of CECMs in a County has no legal basis. The appointment in 2021 of 13 Chief Officers by the Respondents cannot thus be faulted on the grounds relied upon by the Petitioners.
70. The seventh issue for determination is whether the totality of the proposed recruitment will be in violation of the fiscal capping on budgetary allocations to recurrent expenditure on wages and other benefits for employees serving the 2nd Respondent. Regulation 25 of the Public Finance Management (County Governments) Regulations 2015 in part provides as follows: -

“The County Executive Committee Member with the approval of the County Assembly shall set a limit on the county government's expenditure on wages and benefits for its public officers pursuant to section 107(2) of the Act.



The limit set under paragraph (a) above, shall not exceed thirty five (35) percent of the county government's total revenue."

71. Section 107(2) of the [Public Finance Management Act](#), 2012 (PFMA) in part provides as follows: -

"In managing the county government's public finances, the County Treasury shall enforce the following fiscal responsibility principles:-

- b) Over the medium term a minimum of thirty percent of the county government's budget shall be allocated to the development expenditure;
- c) The county government's expenditure on wages and benefits for its public officers shall not exceed a percentage of the county government's total revenue as prescribed by the County Executive member for finance in regulations and approved by the County Assembly."

72. Section 102(1) of the PFMA provides as follows:-

"Each county government shall ensure adherence to:-

- a) The principles of public finance set out in Chapter Twelve of [the Constitution](#);
- b) The fiscal responsibility principles provided in section 107 under this Act;
- c) National values set out in [the Constitution](#); and
- d) Any other requirements of this Act."

73. Chapter 12 of [the Constitution](#) deals with public finance. In particular, article 201 of [the Constitution](#) sets out the general principles that govern management and use of public funds both at national and county government levels. The article underscores the need for prudent, responsible and accountable use of public finance.

74. Undoubtedly, the 2nd Respondent has a duty to adhere to the public finance principles enumerated above. It must ensure that in the medium term, it allocates at least 30% of its total annual revenue to development projects. It must ensure that it does not commit more than 35% of its total revenue towards settling wages and other benefits for its workforce. Failure to do this will undoubtedly be in abuse of the 2nd Respondent's constitutional duty to ensure prudent use and management of public finances entrusted to it.

75. The Petitioners contend that the 2nd Respondent has abused these directions on public finance. They state that from the budget report for the first 9 months of the financial year 2020-2021, during which the proposed recruitment was to occur, the 2nd Respondent committed upwards of 65% of its budgetary allocation to workers' wages and other benefits contrary to the clear stipulations set out above. In support of this claim, the Petitioners tendered in evidence the report by the office of the Controller of Budget for the first 9 months of the financial year 2020-2021 (see the Report dated May 2021 and marked as DKG 2 on the affidavit of David Kariuki Gitau dated October 8, 2021). The report covers the period between July 2020 and March 2021.

76. Pages 163 to 170 of this report address the 2nd Respondent's budget management for the first 9 months for the financial year 2020-2021. The County's revenue performance for the period discloses that at the commencement of the financial year, the 2nd Respondent had a total of Ksh. 2.87 billion available for expenditure. Out of this, the Controller of Budget approved withdrawal by the 2nd Respondent of



- Ksh. 1.93 billion. The sum of Kshs. 1.93 billion authorized for withdrawal was distributed as follows: Kshs. 286.06 million (14.8% of the approved withdrawal) towards development projects; Kshs. 1.64 billion (85.2% of the approved withdrawal) towards recurrent expenditure.
77. Of the Kshs. 1.93 billion approved for withdrawal, Kshs. 1.58 billion was eventually drawn and spent during the accounting period the report covered. The figure of Ksh. 1.58 billion comprised both development and recurrent expenditure.
78. According to the report, the Ksh. 1.58 billion spent by the 2nd Respondent represented 81.8% of Kshs. 1.93 billion, the amount sanctioned for withdrawal by the Controller of Budget for the period under review. Of the Kshs. 1.58 billion, Ksh. 121.06 million was spent on development and Ksh. 1.46 billion on recurrent expenditure.
79. If I understand the report well, it indicates that employee compensation constituted 65.9% of the Ksh. 1.58 billion that had so far been spent during the accounting period. Although significantly high, the 65.9% in employee compensation only relates to the percentage of the total amount spent by the 2nd Respondent during the accounting period. It does not represent 65.9% of the total revenue available to the 2nd Respondent during the financial year 2020-2021. In fact item 3.22.7 at page 165 of the May 2021 report indicates that whilst the amount spent on wages represented 65.9% of the total expenditure, this item comprised only 29.1% of the proportional revenue estimate for the 2nd Respondent for the period under review which was estimated at Kshs. 3.57 billion.
80. On February 7, 2022, the Petitioners filed a list of additional documents that they sought to rely on. These are the audit report for the year ending June 2020 and the County Governments Budget Implementation Report for the first quarter of the financial year 2021-2022. The latter report is dated November 2021. I have not considered the report for the year ending June 2020 because it falls before the proposed recruitment that is the subject of this litigation. In my view therefore, it has no relevance to the current dispute.
81. A review of the November 2021 report also shows that expenditure by the 2nd Respondent on personnel emoluments between July 2021 and September 2021 stood at 17.7% of the first quarter proportional revenue of Kshs. 2.12 billion (see page 168 of the report).
82. In my view, the comments by the Controller of Budget in the two reports on the need to comply with the requirements of regulation 25(1) (b) of the Public Finance Management (County Government) Regulations, 2015 was only cautionary so that the 2nd Respondent remains alive to its statutory obligations regarding prudent expenditure as it implements the budget. This position is supported by the fact that in the observations and recommendations sections of the reports, there is no mention of the fact that the 2nd Respondent had exceeded its budgetary expenditure on recurrent expenditure as compared to development expenditure for the year 2020-2021. On the contrary, what the reports appear to underscore is that the absorption rate of the amount set aside for development was low.
83. On the basis of the material placed before me I am unable to arrive at the conclusion that the 2nd Respondent has violated regulation 25(1) (b) of the Public Finance Management (County Government) Regulations, 2015. Consequently, I hold that there is no cogent evidence to suggest that the proposed recruitment by the Respondents will be in violation of the fiscal capping on budgetary allocations on recurrent expenditure on wages and other benefits for employees in service of the 2nd Respondent.



Determination

84. The final issue relates to what orders should be made in the cause. I will address this sequentially in terms of my findings in the foregoing section.

- a. This being a matter that challenges the right of the 1st Respondent to undertake the recruitment of staff in terms of the advertisement in the Daily Nation of September 24, 2021, it is an employment and labour relations dispute within the meaning of section 12 of the Employment and *Labour Relations Act*. The court has jurisdiction to entertain the matter in view of section 12 aforesaid and rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016

Under article 258 of *the Constitution*, anyone has the right to invoke the court's jurisdiction to protect provisions of *the Constitution* where they are violated or threatened with violation. If I understand them correctly, the Petitioners argue that the decision by the Respondents threatens to violate a series of constitutional provisions including those on public finance. In my view therefore, the Petition is well founded and the court has jurisdiction to entertain it.

Sections 15 and 88 of the CGA do not take away the court's jurisdiction to entertain the current dispute. They only recognize the right of a member of the public to petition the two organs of a County Government (County Assembly and County Executive) on matters that are of concern and in respect of which the said organs may be seized of jurisdiction to address.

- b. Save for the positions of Sub County Administrator, Ward Administrator and County Chief Officers which are established by statute, all other offices set out in the advertisement in the Daily Nation of 24th September 2021 require establishment by the 1st Respondent in the manner provided for under sections 61 and or 62 of the CGA. There is no evidence provided that the 1st Respondent complied with the requirements of sections 61 and 62 of the CGA in setting up these other offices. Accordingly, it is hereby declared that all the positions advertised in the Daily Nation of 24th September 2021 save for those ones of Sub County Administrator, Ward Administrator and County Chief Officer were advertised without proof of their having been lawfully established by the 1st Respondent.

However, in view of the public service nature of these positions, the 1st Respondent will be granted an opportunity to correct this irregularity by seeking approval of the County Assembly to validate the affected offices in terms of section 62 of the CGA. The 1st Respondent should do this within a period of one year from the date of this judgment.

In effect, the effect of this part of the judgment is suspended for a period of one year from the date of the judgment to enable the 1st Respondent correct the anomaly with respect to the said positions. If within the period provided the irregularity shall not have been corrected, the affected positions to which the advertisement relates within the establishment of the 2nd Respondent shall stand nullified.

Further, subject to the regularization aforesaid, the 1st Respondent may proceed to fill and or supplement the positions through a fresh advertisement only limited to the impugned positions. For now, the advertisement in the Daily Nation of 24th September 2021 in respect of all positions other than those of Ward Administrator, Sub County Administrator and Chief Officer is quashed and the Respondents prohibited from carrying on with the exercise until they regularize the anomaly aforesaid.



- c. In respect of the office of Ward Administrator, it is declared that the CPSB has overall disciplinary and management control over county public service officers including Ward Administrators; the CPSB has power to redeploy all such officers including Ward Administrators except as contemplated under the Act; and that as long as the redeployment is with the consent of the affected employee and is not to the disadvantage of an officer, it is lawful.

It is the court's view that the Respondent's advertisement of September 24, 2021 in respect of the position of Ward Administrators was valid but only in respect of four (4) out of the ten (10) Ward Administrator positions. The advertisement in respect of the six (6) other purported vacancies for Ward Administrator was issued in relation to Ward Administrator positions that were not vacant. Accordingly, the advertisement for positions of Ward Administrators in the Daily Nation of September 24, 2021 is quashed in respect of the 6 Ward offices that are not vacant. The Respondents are hereby prohibited from taking steps to fill the 6 Ward offices except when they fall vacant.

- d. With respect to the office of Sub County Administrator for purposes of devolved units, it is the court's view that by virtue of section 48(1) (b) of the CGA, the number of Sub Counties in a County is equivalent to the number of constituencies within the County as established under Article 89 of *the Constitution*. The 2nd Respondent has two (2) constituencies: Lamu East and Lamu West. Therefore, in terms of section 48 of the CGA, it can only have two (2) Sub Counties for purposes of the devolved government.

The third (3) Sub County (Lamu Central) was established as a unit of and exists for purposes of serving the national government and in line with the NGCA it is to be staffed by the national government.

With regard to the validity of deployment of Sub County Administrators to other departments in the County, it is declared that the CPSB has overall disciplinary and management control over county public service officers including Sub County Administrators; the CPSB has power to redeploy all such officers including Sub County Administrators except as contemplated under the Act; and that as long as the redeployment is with the consent of the affected employee and is not to the disadvantage of an officer, it is lawful.

Accordingly, the Respondents are entitled to hire Sub County Administrators for the Sub Counties of Lamu East and Lamu West but not Lamu Central. Consequently, the advertisement in the Daily Nation of September 24, 2021 for Sub County Administrator positions is regular only to the extent of two Sub County Administrator positions for Lamu East and Lamu West. In so far as the advertisement relates to a vacancy for a third Sub County Administrator, it is hereby quashed and the Respondents prohibited from hiring a Sub County Administrator for Lamu Central Sub County.

- e. In respect of County Chief Officers, it is the number of departments set up in a County under section 46 of the CGA but not the number of CECMs that determines the number of Chief Officers to be appointed by the County Executive Committee. A County Government may have as many Chief Officers as the departments it has established. In the court's view, the argument by the Petitioners that the number of Chief Officers must be equal to that of CECMs in a County has no legal basis. Consequently, the appointment in 2021 of 13 Chief Officers by the Respondents was validly undertaken. The prayers sought by the Petitioners in respect of the recruitment of the 13 Chief Officers are declined.



- f. The 2nd Respondent has not committed more than 35% of its total revenue on financing employee wages and other benefits. In the court's view, there was no cogent evidence to suggest that the 2nd Respondent had violated regulation 25(1) (b) of the Public Finance Management (County Government) Regulations, 2015. Consequently, there is no proof that the proposed recruitment by the Respondents will be in violation of the fiscal capping on budgetary allocations on recurrent expenditure on wages and other benefits for employees in service of the 2nd Respondent.
- g. This being public interest litigation, it is ordered that the parties shall bear their own costs.

DATED, SIGNED AND DELIVERED ON THE 23RD DAY OF JUNE, 2022

B. O. M. MANANI

JUDGE

In the presence of:

Bujira for the Petitioners

Mbura for the Respondents

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

JUDGE

