



Biwott v County Public Service Board Baringo County & another (Constitutional Petition E010 of 2022) [2022] KEELRC 1360 (KLR) (29 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 1360 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CONSTITUTIONAL PETITION E010 OF 2022**

NJ ABUODHA, J

JULY 29, 2022

**IN THE MATTER OF ARTICLES 2,10,21,22,23,43,174,176,190,201,232,235
AND 258 OF THE CONSTITUTION OF KENYA 2010**

AND

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

AND

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

AND

**IN THE MATTER OF REGULATION 25 OF THE PUBLIC FINANCE
MANAGEMENT (COUNTY GOVERNMENT) REGULATIONS, 2015
AND IN THE MATTER OF CONTRAVENTION OF FISCAL RESPONSIBILITY
PRINCIPLES BY THE COUNTY GOVERNMENT OF BARINGO**

BETWEEN

ISIAH BIWOTT CLAIMANT

AND

**COUNTY PUBLIC SERVICE BOARD BARINGO COUNTY .. 1ST RESPONDENT
COUNTY GOVERNMENT OF BARINGO 2ND RESPONDENT**

RULING

1. Through a chamber summons dated 1st April, 2022, the Petitioner/Applicant sought orders among others that:



- a) That pending the hearing and determination of the Petition filed herewith, the court be pleased to issue a temporary conservatory order restraining the 1st respondent whether by itself or by its agents, servants and or employees or anybody howsoever acting under it from considering, deliberating, short listing, interviewing, selecting and appointing any persons and or proceedings in any manner howsoever with the recruitment exercise of the purported over six hundred (600) staff at the 2nd Respondent as published in the advertisement carried on the Daily Nation Newspaper of 17th March, 2022.
 - b) That this Honourable Court be pleased to make such orders or other conservatory orders and or directions as would preserve the set of circumstances in such a way that this Petition is not rendered nugatory.
 - c) That this Honourable Court be pleased to give such directions and orders as to the hearing of the Petition filed herewith as it may deem just and expedient in the light of all circumstance.
2. The application was supported by the affidavit of one Isaiah Biwott who deponed among others that:
- a) That by virtue of Article 22(1) and 258 of the Constitution of Kenya, 2010 I have an inalienable right to commence these proceedings for the sole purpose of protecting and upholding the Constitution of Kenya, 2010.
 - b) That the Respondents have contravened and continue to contravene Articles 176, 190 and 201 of the Constitution of Kenya, 2010 and Regulations 25(a) and (b) of the Public Finance Management (County Government) Regulations 2015 which require County Governments to set a limit of their expenditure on wages so as not to exceed 45% of the County Government’s total revenue.
 - c) That the wage bill of the County Government of Baringo is estimated to be more than 45% of its budget and hence contravenes Article 176 (2) of the Constitution of Kenya, 2010 which states that “Every County government shall decentralize its functions and the provision of its services to the extent that it is efficient and practicable to do so.
 - d) That the employment of over six hundred (600) staffs as published in the advertisement carried on the Daily Nation Newspaper of 17th March, 2022 at the 2nd Respondent would only further balloon the wage bill beyond the floor fixed by the law.
 - e) That the proposed recruitment and employment of over 600 staff is illegal and unreasonable. It is a violation of the fiscal responsibility placed on the County Government of Baringo by the Constitution of Kenya, 2010, statute and Regulations.
 - f) That in a letter dated 23rd March, 2022, the County Budget Co-coordinator Mr. Kipkurui Selote gave an Advisory on Baringo County Wage Bill in which he indicated that employment and recruitment of staffs to the 2nd Respondent made to an advert on Daily Nation Newspaper by the 1st Respondent dated 17th March, 2022 will be unlawful but advised that a strategy on employment be adopted in which piecemeal or gradual recruitment process on essential and critical need basis can be applied but which advice has not ignore by the Respondents.
 - g) That the Respondents are reckless and unreasonable in that too much public resources are going towards sustaining a bloated wage bill at the expense of development programs in the County of Baringo. The Respondents are in contravention of Article 201(b)(i) of the Constitution of Kenya, 2010 which demands openness and accountability, including public participation in financial matters.



3. The respondent through one Elijah Kipkorir filed a Replying Affidavit in which he deponed among others that:
 - a) That I am an adult male of sound mind, residing and working for gain in Kabarnet, within the Republic of Kenya and an Acting County Secretary with the 2nd Respondent herein the County Government of Baringo therefore duly authorized and competent to swear this affidavit.
 - b) That the application is alarmist, misconceived and an abuse of the process of the Honourable Court.
 - c) That the applicant has not shown which of their rights is under threat of violation.
 - d) That the applicant's sole reason is that the intended recruitment will increase the wage bill.
 - e) That the applicant has not substantiated the source of his figures and the application is therefore founded on conjecture.
 - f) That whereas the applicant has based its calculations on the Financial year 2020/21 budget of Ksh.7,912,538,919/= the relevant Financial Year is 2021/22 and its allocation is Ksh.9,947,339,707/=. The applicant's figures are therefore false.
 - g) That the applicant's figures are fictitious as the County's Wage Bill trend proves that the 2nd Respondent is within the statutory threshold.
 - h) That pursuant to annexure "EK-1" the salary vote is Ksh.3,442,691,787/= and against the total budget of Ksh. 9,947,33,707/=.
4. In the submissions in support of the application. Mr. Ondabu for the Petitioner/Applicant submitted inter alia that the petitioner was challenging the mass recruitment contending the same was clearly unconstitutional and unlawful. The wage bill was unsustainable and in all aspects contravened the constitutional requirement on prudent and responsible use of public finances as well as constitutional principle on fiscal responsibility under article 201(d) read together with the provisions of the Public Finance Management (County Government) Regulations, 2015.
5. According to Counsel, the respondent had not disputed the facts by the applicant and the accurateness of the applicants figures from the Office of the Controller of Budget for FY 2021/2022 and it was clear that the Budget bill of the County Government of Baringo was more than 45% surpassing the constitutionally required ceiling of 35% of the budgetary allocation.
6. Further, the respondent did not dispute the contents and the substantive issues raised by the annexed advisory report. The 2nd respondent only alleged not to have been aware of the same yet the advisory faults any intended mass recruitment.
7. Mr. Ondabu further submitted that the 2nd respondent was only concerned with staffing and not injecting actual economic development in the departments particularized. It was a conduit to siphon taxpayers' money meant for development in the name of employing a huge staff without taking into account developments in those sectors. In this regard Counsel relied on the case of *Duncan Karuiki Gitau & 2 Others -v Lamu County Public Service Board & Another* Pet. No. E005 of 2021 per Manaani J.
8. Mr. Maiyo on the other hand submitted that the 2nd respondent in its Replying Affidavit had demonstrated that its current wage bill stood at 30.37% of its Budget and was not only within the



statutory limits but also had room for further expenditure and hence the decision to recruit more staff for better services delivery.

9. Counsel further submitted that the respondent demonstrated in their Replying Affidavit that the petitioner made an error of principle by basing his calculations on the previous budget of 2020/2021. This manifest error saw the petitioner arrive at a wrong conclusion which precipitated the current mistaken petition. In this regard Counsel relied on the case of *Mumo Matemo –v- Trusted Society of Human Rights Alliance* [2014] eKLR. Mr. Maiyo thus submitted that a party approaching the Court on the alleged violation of a right and seeking redress must do so with reasonable precision of facts presented to the Court. The petitioner had not shown to the satisfaction of the Court, the right violated or under threat of violation as the petitioner was grounded on error of facts. Further the petitioner had not demonstrated the prejudice he was likely to suffer if the conservatory orders were not granted.
10. Counsel submitted that there was in fact a greater prejudice to be suffered by the respondent if conservatory orders are issued as the respondent had a duty to deliver services efficiently. The petitioner had recourse to damages if successful in the petition. The petitioner had further failed to establish that unless the Court granted the conservatory orders, there was real danger of violation of his constitutional rights. On this point Counsel relied on the case of *Martin Nyaga Wambora –v- Speaker of the County Assembly of Embu & 3 others* [2014] eKLR.
11. This is an interlocutory application for interim conservatory orders pending the hearing and determination of the petition. The principles upon which the Court operates were succinctly stated by my brother Justice W. Korir in the case of *Platinum Distillers–v- Kenyan Revenue Authority* [2019] where the learned Judge observed as follows:

“The law as I understand it, is that in considering an application for conservatory orders, the Court is not called upon and is indeed not required to make any definitive finding either of fact or law as that is the province of the Court that will ultimately hear the petition. The jurisdiction of the Court at this point is limited to examining and evaluating the material placed before it, to determine whether the applicant has made out a prima facie case to warrant grant of conservatory orders. The court is also required to evaluate the pleadings and determine whether denial of conservatory orders will prejudice the applicant.”
12. The petitioner has complained that the intended recruitment exercise would further balloon the 2nd respondent’s wage bill which according to the petitioner presently stands at more than 45% of its budget allocation hence contravenes article 176(2) of *the Constitution* and Regulations 25(a) and (b) of the Public Finance Management (County Government) Regulations, 2015, which require County Governments to set a limit on their expenditure on wages not to exceed 35% of the County’s total Budget.
13. The 2nd respondent has refuted the allegation and stated that the Budget estimates relied on by the Petitioner is an old one. Mr. Kipkoros attached what he considered as the latest budget estimate which places the County Governments’ expenditure to wages at approximately 3.4 billion while the total budget allocation was approximately 9.9 billion. This, he argued was only 30% of the total budget allocation hence there was still room for recruitment to meet the 35% ceiling hence the intended recruitment was within the budget.



14. The petitioner also attached with the application a letter dated 23rd March, 2022 from the office of the controller of Budget. This letter was entitled, “Advisory on Baringo County Wage Bill”. The letter stated in part as follows:

“Regulations 25(1)(b) of Public Finance Management (County Governments) Regulations, 2015 sets limit on the County Government’s expenditure on wages and benefits at 35% of the Country’s total revenue. As things stand, the projected wage bill for FY 2021/2022 amounts to Ksh.3.38 billion and translates to 46.3% of the total County revenue excluding roll over which is above the ceiling provided.

The county wage bill has been on increasing trajectory and averaging 54.3 per total expenditure and 38.5 per cent of the total budget in the last five years, notwithstanding the staff who have exited either on resignation, retirement or natural attrition cases.

Reference is made to an advert on Daily Nation Newspaper by Baringo County Public Service Board dated 17th March, 2022 where it wishes to recruit over 625 personnel to fill in the vacant positons across various departments... Although the move is good and right, to bring on board 600 personnel into the payroll system at once may pose serious financial challenges and budget constraints as the County will be constrained to pay mainly salaries at the expense of development priorities. The Board should therefore re-engineer their employment strategy by adopting piecemeal or gradual recruitment process on essential and critical need basis over time in tandem with the growth in revenue resources envelope”

15. Mr. Kipkoros in his replying affidavit to the application has described the above letter as strange and urged that it be expunged from the record. He further described the figures relied on by the County Budget Coordinator as strange and unknown. Mr. Kipkoros further complained that the advisory was made on 23rd March, 2022 after the advertisement of the vacancies by the 2nd respondent on 17th March, 2022 hence the advisory was ill timed and made to counter the already advertised recruitment and was therefore not in good faith.
16. The office of the Controller of Budget is established under article 228 of *the Constitution* to oversee and report on the implementation of Budgets of both National and County Government. Further article 228(5) of *the Constitution* grants the Controller of Budget power to refuse to approve any withdrawal from public funds if satisfied that the withdrawal is not authorised by law.
17. In writing the letter dated 23rd March, 2022, the County Budget Coordinator was exercising delegated power conferred on the Office of the Controller of Budget by *the Constitution*. It is therefore not enough for the respondent to dismiss the letter as strange and urge me to expunge the same from the record. The 2nd respondent has not alleged that the letter was a forgery or written without authority. All it did was to question the timing of the letter arguing it was not in good faith.
18. An advisory by an officer whose power to advice is conferred by *the Constitution* cannot be simply wished away by describing such advice as strange and in bad faith. There has to be credible and valid ground to challenge and or go against such advice.
19. The Court may agree by the 2nd respondent that the positions sought to be filed are essential and necessary for effective service delivery to the people of Baringo County however such urgency must not contravene the Constitutional and statutory safeguards in place to protect public finance from misallocation and use.



20. As observed earlier, this is an interlocutory application and the role of the Court is limited to examining and evaluating the material placed before it to determine whether the applicant has made out a prima facie case to warrant grant of the interlocutory order sought.
21. In the case of *Gatirau Munay v Dickson Mwenda Kithinku & 2 Others*[2014] eKLR the Supreme Court observed as follows concerning conservatory orders:

“conservatory orders should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and proportionate magnitude and priority levels attributable to relevant causes.” (underling mine)
22. The public interest and constitutional values intended to be canvassed in this petition leans in favour of granting conservatory orders sought. The Court therefore grants prayer 3 of the Chamber Summons dated 1st April, 2022 pending the hearing and determination of the Petition. Parties are hereby directed to fast track the petition for hearing and disposal.
23. It is so ordered

DATED AT ELDORET THIS 29TH DAY OF JULY, 2022

DELIVERED THIS 29TH DAY OF JULY, 2022

ABUODHA JORUM NELSON

JUDGE

