



Saina & another v County Government of Uasin Gishu & another (Petition E018 & E019 of 2022 (Consolidated)) [2022] KEELRC 3863 (KLR) (29 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 3863 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
PETITION E018 & E019 OF 2022 (CONSOLIDATED)**

**NJ ABUODHA, J
JULY 29, 2022**

BETWEEN

PERIS SAINA 1ST PETITIONER

DENNIS KIPLIMO SIRMA 2ND PETITIONER

AND

COUNTY GOVERNMENT OF UASIN GISHU 1ST RESPONDENT

UASIN GISHU COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

RULING

1. The respondent raises a preliminary objection to the effect that the petitioners were prematurely before the court in that they had not exhausted the appeal process provided for under article 232(2)(i) of the *Constitution*, section 77(i) and (2) (a) of the *County Government Act* and sections 85(a) and 87 (b) of the *Public Service Commission's Act* and rule 8 of the *Public Service Commission (County Government Public Appeals Procedures) Regulations, 2016*.
2. According to Mr Mwangi for the respondent the power, authority obligation and mandate to recruit, select, appoint and set qualifications attached to any office in the county public service lies with the county public service board. Therefore, the decision to recruit internally or externally by the board is a decision of the board within the meaning of section 8 of 2016 regulations. A dissatisfaction with the decision of the board on matters of recruitment is a decision that can be challenged by any aggrieved or affected person.
3. The argument by counsel may sound novel and sound however, the court does not think it is correct that any aggrieved or affected person can invoke the appeal process provided for under *Public Service Commission Act*. The act and *County Government Act* governs relationship between the public service commission and public servants. A person who is already a public servant, if aggrieved by the decision of a county public service board or any body subject to the commission may appeal to the commission.



The appeal process is therefore open to public servants who already have a relationship with the commission and not any member of the public. The correct interpretation of the phrase

“Any person who is dissatisfied or affected by the decision made” is that it refers to public officers aggrieved or dissatisfied and not any other person. Any other interpretation would be wrong as it would have the effect of turning public service commission to a court or tribunal adjudicating all manner of appeals from members of the public dissatisfied by decision of county public service and would lead to absurdity. The petitioners before me are not public officers hence the only forum they could use to question the decisions of the county public service board which affect the public is by invoking the jurisdiction of the court. The preliminary objection is therefore found without merit and is hereby dismissed.

4. On the issue of conservatory orders. The Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwenda Kitinji & 2 others* [2014] eKLR stated that conservatory orders should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitude and priority levels attributable to relevant causes.
5. The petitioners contend that the respondents caused to be advertised internal job vacancies on various positions. The process according to the petitioners was discriminatory, unconstitutional and unlawful locking out general members of the public. According to the petitioners should the recruitment process proceed, a large number of qualified applicants would be left out.
6. Counsel for the respondent has drawn the courts attention to the respondent’s recruitment, selection and appointment manual which according to counsel permitted internal advertisement for job vacancies. The manual according to counsel is a good policy and in the public interest of the employees of the respondent as it would not be good policy to look outside when there were competent and qualified internal staff who can fill the open positions. This was also an important opportunity for internal staff to get promotions.
7. The petition in essence challenges the constitutionality of the respondents recruitment, selection and appointment manual which apparently permits internal recruitment. Should the petitioners become successful, the appointments can be nullified by the court. If they became unsuccessful, the respondents operations would not have been slowed down or impaired due to shortage of staff in key areas that they sought to fill. In the circumstances the proportionate magnitude, and priority level of this case leans against the granting of conservatory orders. The application is therefore rejected. The parties are however advised to fast track the petition for hearing in order to settle the constitutional legality or otherwise of the respondent’s recruitment manual which permits internal job advertisement and recruitment.
8. It is so ordered

DATED AT ELDORET THIS 29TH DAY OF JULY, 2022

DELIVERED THIS 29TH DAY OF JULY, 2022

Abuodha Jorum Nelson

Judge

