



Onyango v Governor, County Government; County Public Service Board, Homa Bay County (Interested Party) (Petition E034 of 2022) [2022] KEELRC 13314 (KLR) (30 November 2022) (Judgment)

Neutral citation: [2022] KEELRC 13314 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E034 OF 2022**

S RADIDO, J

NOVEMBER 30, 2022

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19, 20, 21, 22, 23, 24, 27, 41, 47, AND 50 OF THE CONSTITUTION OF KENYA, 2010, AS READ TOGETHER WITH THE FAIR ADMINISTRATIVE ACTION ACT, 2015 AND IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, THE OFFICE OF THE COUNTY ATTORNEY ACT, AND THE APPOINTMENT OF THE COUNTY ATTORNEY FOR THE HOMA BAY COUNTY GOVERNMENT

BETWEEN

DENNIS OCHIENG ONYANGO PETITIONER

AND

GOVERNOR, COUNTY GOVERNMENT OF HOMA BAY RESPONDENT

AND

COUNTY PUBLIC SERVICE BOARD, HOMA BAY COUNTY INTERESTED PARTY

JUDGMENT

1. Dennis Ochieng Onyango (the Petitioner) was nominated as the County Attorney by the then Governor, County of Homa Bay, after a competitive recruitment exercise in August 2021. The County Assembly debated a report recommending the nomination and rejected it on 30 November 2021.
2. The then Governor was not satisfied with the rejection of the Petitioner, and he resubmitted the name to the County Assembly on or around 5 June 2022. The Governor invoked section 10(2) of the *Public Appointments (County Assemblies Approval) Act* in resubmitting the name.



3. However, the County Assembly adjourned sine die on 12 July 2022 without debating the Governor's request for approval.
4. On 2 August 2022, the then Governor sent to the Government Printer a notice on the appointment of the petitioner, but a swearing-in ceremony scheduled for 5 August 2022 was aborted because the Government Printer failed to gazette the appointment in time.
5. On 23 August 2022, the Petitioner lodged a Petition with the Court to challenge the failure of the newly elected Governor (the Governor) to appoint him or issue him with an appointment letter.
6. The Petitioner contended that the failure violated articles 2, 3, 10, 19, 20, 21, 22, 23, 24, 27, 41, 47 and 50 of the Constitution.
7. When the Petition was placed before the Court on 20 September 2022, it directed the Governor and the County Public Service Board (the Board sued as Interested Party) to file and serve responses before 30 September 2022.
8. The Governor and the Board did not comply with the timelines set on 20 September 2022.
9. On 4 October 2022, the Petitioner filed a Motion under a certificate of urgency seeking interim orders restraining the recruitment for the position of County Attorney.
10. When the parties appeared on 4 October 2022, the Court issued new directions. The court also granted an order restraining the further processing of any recruitment for the office of the County Attorney pending delivery of this judgment.
11. The acting County Secretary filed a replying affidavit on behalf of the Governor and the Board.
12. The Petitioner filed a supplementary affidavit and submissions on 4 November 2022, while the Governor and the Board filed joint submissions on 18 November 2022.
13. The Petitioner outlined 4 Issues for determination:
 - i. Whether or not the respondent violated the petitioner's rights and breached the law in cancelling the swearing of the petitioner and failing to give him his letter of appointment?
 - ii. Whether the respondent by its conduct herein breached the national values and principles of governance and the petitioner's legitimate expectation?
 - iii. Whether the respondent breached the petitioner's right to fair administrative action?
 - iv. Whether the honourable court is possessed of the requisite jurisdiction to grant the orders sought herein?
14. The Governor and the Board adopted the same issues in their submissions.
15. The court has considered the Petition, Motion(s), affidavits, and submissions.

Jurisdiction

16. The Governor and the Board challenged the court's jurisdiction on the ground that the Petitioner had not exhausted the alternative dispute resolution avenues outlined in section 77(2) of the County Governments Act.



17. The proviso requires that any dispute arising out of county public service with respect to recruitment, selection, qualifications, and appointment should be channeled to the Public Service Commission at the first instance.
18. The Petitioner, however, took the position that the dispute before the Court was peculiar because it was challenging inaction on the part of the Governor to issue an appointment letter or swear him into office. He contended that the Board had not made any decision capable of being appealed.
19. The Petitioner also countered that he appealed to the Public Service Commission, but the Governor had failed to respond to the appeal and that, in any case, the Public Service Commission had no power to grant injunctive relief considering the exceptional circumstances of the case.
20. Section 77 of the [County Governments Act](#) has set out two distinct circumstances under which an appeal lies to the Public Service Commission.
21. The first instance is envisaged by section 77(1) of the [County Governments Act](#), i.e., where there is an exercise of disciplinary control by or on behalf of the County Public Service Board.
22. Section 77(2) of the Act, on the other hand, creates another instance where an appeal should be made to the Public Service Commission.
23. The circumstances are where there is a dispute concerning recruitment, selection, appointment, and qualifications to an office in the county public service and those implicating the applicability of the national values and principles of governance, amongst others.
24. In the case at hand, the Petitioner appealed to the Public Service Commission on or around 8 August 2022, but instead of allowing the Public Service Commission sufficient time to handle the appeal, he moved the court (about 3 weeks later, 23 August 2022).
25. By the time the petitioner invoked the court's jurisdiction, the Public Service Commission had not made any determination one way or the other.
26. Considering that the petitioner made an appeal, the court is of the view that the Public Service Commission should have been joined to the proceedings to avoid the risk of inconsistent decisions being made by the two organs.
27. The court is, therefore, of the view and holds that the petitioner should have allowed the Public Service Commission to address the appeal one way or the other before invoking the court's jurisdiction.
28. The Petition was filed prematurely.
29. On the assumption it is wrong on the jurisdiction question, the court will examine the merits of the Petition.

Whether the Governor violated the Petitioner's rights

30. The office of the County Attorney is established by section 4 of the [Office of the County Attorney Act](#).
31. Section 5(1) of the Act provides:
The County Attorney shall be appointed by the Governor with the approval of the county assembly.
32. The position of the County Attorney was advertised, and a competitive recruitment process was conducted. The Petitioner emerged tops and the Governor sent the name of the Petitioner to the County Assembly for approval on or around 6 July 2021.



33. Despite being recommended by the relevant Committee, the members of the County Assembly, in exercising their democratic right of approval, rejected the recommendation to approve the Petitioner.
34. The court cannot go behind the merits of the vote.
35. The court is of that persuasion because the petitioner did not place any reason or convincing precedent that he was entitled to a hearing before the plenary of the Assembly during the debate or before the approval vote. Simply put, the petitioner did not prove that he was entitled to any constitutional or legal protection as to how the members of the Assembly would vote.
36. It is not disputed that after the initial rejection, the Governor resubmitted the name of the Petitioner for approval on or around December 2021 and 5 June 2022 as contemplated by section 10(2) of the [Public Appointments \(County Assemblies Approval\) Act](#).
37. The tenure of the members of the County Assembly ended before they could deliberate on the resubmission.
38. The petitioner asserted that because of the failure by the County Assembly, the Governor could lawfully deem that approval had been given, and therefore, there was no lawful justification by the Governor not to swear him.
39. The office of the [County Attorney Act](#) expressly requires that the County Assembly approves an appointment of a qualified person as a County Attorney.
40. The County Assembly of Homa Bay never gave its imprimatur to the appointment of the Petitioner to the office of County Attorney, and without the approval, the legal hands of the Governor were tied.
41. The Governor could not appoint the Petitioner without the approval of the County Assembly, and the Court finds that the Governor did not violate any of the rights of the Petitioner by not swearing him or issuing him an appointment letter.
42. Equally, the Petitioner did not demonstrate that the Governor violated any law or his right to legitimate expectation.
43. Before concluding, the court is of the view that the Petitioner should have joined to the proceedings, the County Assembly, for it's the organ that failed to deal with the approval motion upon the resubmission of his name.
44. The Public Service Commission should also have been joined, for it had pending before it, an appeal lodged by the Petitioner.

Conclusion and Orders

45. It must be evident by now that the court must not only down its pen.
46. Considering the findings on jurisdiction, the Petition is struck out with no order on costs.

DELIVERED VIRTUALLY, DATED, AND SIGNED IN KISUMU ON THE 30TH DAY OF NOVEMBER 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioner Prof Albert Mumma & Co. Advocates



For Respondent and
Interested Party Otieno, Yogo, Ojuro & Co. Advocates
Court Assistant Chrispo Aura

