



REPUBLIC OF KENYA



**Omao v County Government of Nyamira & 4 others (Petition E013 of 2022)
[2022] KEELRC 13205 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13205 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E013 OF 2022
CN BAARI, J
NOVEMBER 17, 2022**

BETWEEN

VINCENT MARIITA OMAO PETITIONER

AND

COUNTY GOVERNMENT OF NYAMIRA 1ST RESPONDENT

GOVERNOR NYAMIRA COUNTY 2ND RESPONDENT

COUNTY SECRETARY, NYAMIRA COUNTY 3RD RESPONDENT

**CHAIRPERSON, NYAMIRA COUNTY PUBLIC SERVICE BOARD 4TH
RESPONDENT**

**SECRETARY, NYAMIRA COUNTY PUBLIC SERVICE BOARD 5TH
RESPONDENT**

JUDGMENT

1. The petitioner herein, lodged this petition on March 2, 2020, seeking the following reliefs:
 - a) A declaration that the respondents have jointly and severally violated his fundamental rights and freedoms as protected under articles 27, 28, 41, 47 and 55 of the [Constitution](#).
 - b) A declaration that the advertisement inviting applications without the necessary budgetary approvals is unconstitutional, illegal and in violation of the [Public Finance Management Act, 2012](#).
 - c) A declaration that the creation of the position of Deputy County Secretary is illegal and irregular and in contravention and/or violation of the [County Government Act, No 17 of 2012](#); [Employment, Act, 2007](#) and article 10 of the [Constitution](#), 2010.



- d) A declaration that the respondents herein were obliged and/or enjoined to advertise all the vacancies and/or portfolios in the Nyamira County Government and thereby carry out and/or conduct a transparent and/or accountable recruitment, in compliance and in accordance with article 10(1), (c) of the Constitution.
- e) An order of Judicial Review for orders of certiorari to remove into the Honourable Court for quashing the decision of the respondents to advertise non-vacant and non-existent positions and as conveyed the advertisements by the respondents and without due regard to the provisions of the County Government Act and articles 10 of the Constitution of Kenya, 2010.
- f) An order declaring the decision of the respondents prompting to advertise non-vacant and non-existent positions illegal and irregular and the same be brought into the court and be quashed pursuant to an order of certiorari.
- g) A permanent injunction be issued restraining the respondents either by themselves, agents, servants and/or enlisting employees without complying with the due process of the law, and in particular, the provisions of the County Government Act, 2012 and article 10(1) of the Constitution of Kenya, 2010.
- h) A permanent injunction, restraining the respondents either by themselves, agents, servants and/or employees, from admitting the subject employees to the payroll of the 1st respondent and/or making any payments to and/or in favour of the said employees, either on account of remuneration, allowance and/or salaries, without the necessary budgetary approval of the Nyamira County Government, whatsoever and/or howsoever.
 - i) A permanent injunction restraining the respondents either by themselves, agents, servants and/or employees, from employing, recruiting and/or enlisting employees without complying with the due process of the law and in particular, the provisions of article 10 (1) of the Constitution of Kenya, 2010.

2. The petition is premised on the grounds that:

- i. The chief officers of the respective posts who were the authorized officers have not deposited an annual recruitment plan with the County Public Service Board to cause the said vacancies.
- ii. There is no budgetary provision for the advertised positions as per the 1st supplementary budget for the year 2020/2021.
- iii. Some of the positions advertised are not in the Organizational Structure of the County Government of Nyamira.
- iv. There is no approved staff establishment providing the existence of the Deputy County Secretary, neither is the said post envisaged under section 44 of the County Government Act, 2012.
- v. Letters of appointment had been issued for the positions of physiotherapist iii and senior support staff to the persons living with disabilities, albeit un-procedurally, and hence the advert seeking to recruit persons with disabilities to the said positions again is just but a cover up.
- vi. The positions of the sub-county administrators and the ward administrators have not been declared vacant, and further that the respondents had exceeded the set number of employees in the said post by employing six (6) officers instead of the required 4, hence, the intended new recruits will amount to over-recruitment.



- vii. For the position of the ward administrators, there are 20 wards but the respondent proceeded and hired 26 officer and have not specified which positions are vacant and require to be filled.
 - viii. The position of physiotherapist, is not within the staff establishment of the Public Service Management, hence the 1st respondent have no policy guidelines on affirmative action.
 - ix. By adding extra positions is meant to ‘create vacancies’ for political expedience to award cronies during the electioneering period.
3. The respondents replied to the petition *vide* a replying affidavit sworn by a Dr Peter Kereri on April 1, 2022. The respondents’ case is that:
- i. The County Public Service Board advertised positions that had fallen vacant in line with section 66 of the *County Government Act*, and that the decision to advertise was arrived at after a series of consultative meetings and respective resolutions of the Board.
 - ii. The respondents further contend that the recruitment being carried out by the county was aimed at replacing staff that had left, and which did not require specific budgetary allocation since the positions already existed and had been factored in the budget.
 - iii. The respondents aver that the County Executive Committee (CEC) held a meeting on the June 23, 2021, and resolved to create two offices, one being the office of the deputy county secretary and the other, the office of the deputy chief of staff.
 - iv. The respondents further aver that the issue of establishment of these offices has been litigated before, and the court made a finding that the office was properly created.
 - v. The respondents state that the decision of the CEC was communicated to the CPSB *vide* a letter dated July 19, 2021, and which in turn proceeded to establish the said positions.
 - vi. The respondents aver that on the June 23, 2021, the CEC resolved that one position of the sub-county administrator and those of the ward administrators were vacant and should be filled through a competitive process.
 - vii. The respondents further state that the letter dated September 15, 2021, indicate that the County Government resolved to replace officers who had exited service, and not establishing new offices as alleged by the petitioner.
 - viii. The respondent further states that the various persons listed in the petition, were initially sub county administrators who now occupying different positions in the county, thus leaving their positions vacant and available for filling.
 - ix. The respondents aver that as shown under paragraph 31 of the response, it is evident that the cancelled recruitment exercise related to different positions from those impugned in the instant petition.
4. Parties sought to canvass the petition through written submissions. Submissions were filed for both parties.

The Petitioner’s Submissions

5. The petitioner submits that the job advertisements placed by the respondents are unlawful and illegal as they are intended to reward cronies, and hence ought to be quashed.



6. It is the petitioner's submission that county executive committee members have no powers to declares vacant positions. The petitioner further submits that the respondents have not attached any evidence or appointment letters or designation letters of the staff subject of this petition.
7. The petitioner submits that to the extent that the impugned advert purports to recruit and or fill the position of the Deputy County Secretary, the advert is illegal, highly irregular and a violation of the express provisions of section 60, 61 and 62 of the [County Government Act](#). He sought to rely in [Chang'orok Komolng'ole Erick v County Government of West Pokot & 3 Others \[2016\] eKLR](#) for this proposition.

The Respondents' Submissions

8. It is submitted that the respondents had a statutory duty and mandate to decide which offices to create that would best serve the interest of the County Government of Nyamira, and what qualifications were required from persons to be appointed to those offices or posts.
9. The respondents further submit that positions that were vacant were properly advertised in line with section 66 the [County Government Act](#), which lays down procedures on recruitment.
10. It is submitted for the respondents that although the petitioner brought this suit under article 3(1), 22(2) and 258(2)(c) of the [Constitution](#), his intention in bringing the petition was to advance his own interests
11. The respondents further submit that the petitioner has failed to demonstrate how the impugned recruitment process adversely affected the residents of Nyamira County, or how it affected him either in his individual capacity or as a resident of Nyamira County or how it was inefficient, unlawful, unreasonable and procedurally unfair. They had reliance in the holding of the Court of Appeal in [Anarita Karimi Njeru v Attorney General \[1979\] KLR 54](#) to buttress this position.

Analysis and Determination

12. I have carefully considered the petition, the respondents' replying affidavit, the petitioner's further affidavit and the submissions by both parties. The issue for determination is whether there is a violation(s) of the [Constitution](#) as to entitle the petitioner to the remedies sought.
13. It is now settled that this court is clothed with the power to enforce employment and labour rights, as well as interpret the [Constitution](#) on matters that fall within its jurisdiction. In [Daniel N Mugendi v Kenyatta University & 3 others \[2013\] eKLR](#) the court opined:

“.....the Employment and Labor Relations Court has jurisdiction to enforce labour rights in article 41 and the jurisdiction to interpret the [Constitution](#) and fundamental rights and freedoms, incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the [Industrial Court Act](#), then the Industrial Court has jurisdiction to enforce, not only article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the [Constitution](#) within the matter before it.”
14. In the instant petition, the petitioner's assertion is that the recruitment process undertaken by the respondents was discriminatory, mischievous and informed by ulterior motives. The petitioner further contends that the recruitment is a violation of national values and principles of governance in that they lacked transparency and equity.



15. The respondents on their part, contend that they have a statutory duty and mandate to decide which offices to establish to best serve the interest of the County Government of Nyamira, and the qualifications required from persons to be appointed to those offices.
16. The respondents further contend that positions that were vacant were properly advertised in line with section 66 the [County Government Act](#), which stipulates the procedures on recruitment. Indeed, the court record demonstrates that meetings were held by various offices at the County Government such as the County Executive Committees, and resolutions made and communicated on establishment of offices, filling of vacant posts and replacement of persons that had for one reason or the other left the service of the respondents.
17. The petitioner has not substantiated in what way the recruitment process was discriminatory, and against whom, noting that the advertisements were made public, and so was the recruitment process.
18. The petitioner's assertion that some individuals were given an undue advantage is in my view, merely speculative premised on the fact that he has not told the court who got an undue advantage and in what way.
19. Further, the petitioner's assertion that the recruitment is not backed by a budgetary allocation is unfounded, as no evidence has been led to demonstrate that the respondents did not have a budget to support the recruitment, and furthermore, the persons recruited have not complained that they have not been paid salaries and/or any benefits attendant to the appointment.
20. In sum, the petitioner has failed and/or neglected to prove that the recruitment process undertaken by the respondents was not necessary, and further that he has not proved with precision how articles 10, 2(2), 27(1), 47(1), 50(1) and 236 of the [Constitution](#) that he alleges were breached were contravened as required.
21. In [Anarita Karimi Njeru v Republic \[1979\] eKLR](#); the court held that a person claiming constitutional infringement must give sufficient notice of the violation to allow the adversary to adequately prepare her case. Further, in [Trusted Society of Human Rights Alliance v Attorney General and 2 others \[2012\] eKLR](#) the court stated as follows: -

“ 45 We point out that Anarita Karimi Njeri was decided under the old Constitution. The decision in the case now must be reconciled and be brought into consonance with the new Constitution. In our view, the present petition with regard to admissibility of petitions seeking to enforce the [Constitution](#) must begin with the provisions of article 159 on the exercise of judicial authority. Among other things, this article stipulates that; (a) Justice shall be administered without undue regard to procedural technicalities; and (e) The purpose and principles of this constitution shall be protected and promoted.

46. We do not purport to overrule Anarita Karimi Njeri as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violation and allow the adversary to adequately prepare her case and to save the court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new constitution is whether a petition as stated raises issues which are so insubstantial and so attenuated that a court of law properly directing itself of the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violations alleged.



The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the respondents in a constitutional petition are fashioned in a way that gives notice to the respondents about the nature of the claims being made so that they can adequately prepare their case.”

22. Further, for reason that the petition herein concerns recruitment of persons into the County Government Public Service, this is a complaint the petitioner should at the first instance have raised through the Public Service Commission per sections 77 of the County Government Act and sections 85 and 87(2) of the Public Service Commission Act, in form of an appeal, before seeking redress from this court.
23. In my opinion, the petition is an attempt by the petitioner to micromanage the working of the County Government in the guise of public interest litigation.
24. To this end and taking into consideration the evidence before court, I find no violations and/or infringement of the petitioner’s rights and fundamental freedoms, be they constitutional, statutory or both.
25. In conclusion, I find the petition lacking in merit, and is hereby dismissed in its entirety.
26. I make no orders as to costs.
27. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 17TH DAY OF NOVEMBER, 2022.

CHRISTINE N BAARI

JUDGE

Appearance:

Mr Vincent Mariita Omao the petitioner

Mr Anyoka present for the respondents

Christine Omollo- C/A

