



**Amisi & 2 others v Deputy Commissioner, Chesumei Sub-County & 3 others (Miscellaneous Case E024 of 2021) [2022] KEELRC 13103 (KLR) (1 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13103 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
MISCELLANEOUS CASE E024 OF 2021  
NJ ABUODHA, J  
NOVEMBER 1, 2022**

**BETWEEN**

**SILAS ANDAYI AMISI ..... 1<sup>ST</sup> APPLICANT  
MAGDALENA JEMELI ..... 2<sup>ND</sup> APPLICANT  
FLORENCE SANGUTEI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**DEPUTY COMMISSIONER, CHESUMEI SUB-COUNTY ..... 1<sup>ST</sup> RESPONDENT  
COUNTY COMMISSIONER, NANDI COUNTY ..... 2<sup>ND</sup> RESPONDENT  
PRINCIPAL SECRETARY, MINISTRY OF INTERIOR & COORDINATION OF  
NATIONAL GOVERNMENT ..... 3<sup>RD</sup> RESPONDENT  
ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The applicant sought an order of this court in the nature of mandamus to compel the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent to release the results of the interview held on January 8, 2021 for the post of Chief II for Chemundu Location pursuant to the advertisement dated November 17, 2020 and subsequently to issue an appointment letter to the best and/or most qualified candidate as per the interview results.
2. The applicants further sought an order of prohibition restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent from issuing further advertisement or undertaking any other interviews for the post of Chief II Chemundu Location or Assistant Chief II for Baraton Sub-location before written reasons are given as to why no results were declared for the three interviews conducted in a row.
3. The application was supported by statutory statement by the applicants in which they stated in the main that:



- a. The 1<sup>st</sup> respondent sent out two advertisements dated March 6, 2015 for applications for the post of Chief II for Chemundu Location which closed on April 10, 2015 and another in November, 2017 seeking similar applications for the said post after which an interview was undertaken on May 8, 2015. No interview took place in the second instance.
  - b. The 1<sup>st</sup> respondent later sent out another advertisement dated November 17, 2020 seeking application for the post of Chief II for Chemundu Location that was indicated to close on December 18, 2020. An interview was subsequently undertaken on January 5, 2021.
  - c. No results have been declared to-date but instead an advertisement has now been issued seeking application for the post of Assistant Chief II for Baraton Sub-location that has been held by Mrs Emily Chirchir thereby confirming fears that she may have been secretly appointed to the position of Chief, Chemundu location thereby creating a vacancy in her earlier post.
  - d. No reasons have been given as to why the first and the second interviews did not yield desired results neither have the results of the third interview been declared despite parties having participated with legitimate expectations to be informed thereof.
  - e. There are fears that there has been political interference in the whole recruitment process with concerted attempts to ensure that the said Mrs Emily Chirchir makes it to the shortlisted top three candidates in order for her to be promoted to the said position by the relevant authority by all means notwithstanding her academic qualifications that are far below those of the other candidates.
  - f. With the placement of fresh advertisements for the post of Assistant Chief II, it is apparent that the 1<sup>st</sup> respondent in conjunction with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents intend to formally install their preferred candidate as Chief, Chemundu Location and shortlist suitable candidates and summon those shortlisted for an interview for the post of Assistant Chief II for Baraton Sub-location yet no official/written communication has been received by the applicants over the decision not to release the results of the two previous interviews and/or the results of the third interview being declared despite a demand issued to them to that effect by the applicants' advocates on May 6, 2021.
  - g. Seven (7) applicants were shortlisted including the current Assistant Chief Mrs Emily Chirchir, Ronald Kiptoo Menjo, Abraham Yego, Stephen Yego among others and duly interviewed but none has received any communication as to the outcome of the said interview.
4. The application was further supported by the affidavit of the applicants which verified the averments in the statutory statement.
  5. The respondents filed a replying affidavit through one Dr Karanja Kibicho in which he deponed among others that:
    - a. That I am the Principal Secretary, State Department of Interior and Citizen Services and the Appointing Authority and the Accounting Officer in the Ministry of Interior and Coordination of National Government, competent to swear this affidavit on behalf of the respondents.
    - b. That the notice of motion is incurably defective, incompetent, untenable and offends order 53 of the Civil Procedure Rules and other enabling legislations while the affidavits and documents accompanying the application contain falsehoods and misrepresentations meant to hoodwink and mislead this court unfairly and unjustly.



- c. That I verily believe to be correct that this court lacks jurisdiction to entertain the instant notice of motion which seeks to challenge the merit and justification of the impugned interviews held on January 5, 2021 hence outside the purview of judicial review.
  - d. That the post of Chief-Chemundu location became vacant for ten years after the cancellation of offer of appointment of Noah Kipkoech Kosgei *vide* letter dated August 28, 2010 ref No ESTAB 12/3/XVI/392.
  - e. That it is within my knowledge that the said Noah Kipkoech Kosgei filed a petition challenging his cancelled appointment by the Permanent Secretary Provincial Administration & Internal Security which further delayed the appointment exercise *vide* ELRC Petition No 2 of 2018. [Noah Kipkoech Kosgei vs Principal Secretary Ministry of Interior and Co-ordination of National Government](#) which was finalized but the petitioner filed an appeal at the Court of Appeal in Eldoret on the grounds that the award was inadequate.
  - f. That upon the conclusion of ELRC Petition No 2 of 2018 in 2019 the post was advertised vide a letter ref: SRST 1/3/70 Vol 59 dated November 11, 2020 calling for suitably candidates to tender the applications for the job.
  - g. That one Emily Chirchir, the former Assistant Chief for Baraton Sub Location was appointed in an acting position as the Chief of Chemundu location who also participated in the impugned interviews for the position of a Chief.
  - h. That seven (7) candidates were shortlisted for the interviews that were held on January 5, 2021 and 3 candidates were shortlisted for the post of Chief of Chemundu location.
  - i. That the results of the interviews were then forwarded to the Regional Commissioner who in turn forward the same to the Principal Secretary to appoint any of the top three (3) candidates.
  - j. That it is clear that the applicants herein are more concerned with an invalidated and speculative decision as none of the top (3) candidates has been appointed as Chief Chemundu location as alleged by the applicants.
  - k. That the claims by the applicants that the post of Chief, Chemundu location was re-advertised via advertisement dated May 26, 2021 is unfounded, fallacious and misleading as the advertisement is in relation to the post of Assistant Chief-Chemundu location whereas the advertisement dated November 17, 2020 was for the post of Chief, Chemundu location.
  - l. That further based on the above observation the subsequent application is a non-starter and can only be viewed as an attempt by the applicants to interfere with the selection process to ensure their preferred candidate is appointed.
  - m. That in any case the period within which to file the substantive application to challenge the decision has since lapsed pursuant to order 53 rule 2 of the [Civil Procedure Rules](#).
  - n. That the selection and appointment exercise for the post of Chief, Chemundu Location was not only fair but also through an open, transparent and competitive recruitment exercise within the letter and spirit of the [Constitution of Kenya](#) and other written law.
6. From the record only the respondent filed submissions. Ms Tigoi submitted in the main that the applicants were not entitled to the apply for an order of mandamus because they had not demonstrated the existence of a statutory duty owed towards them by the respondent. According to counsel the applicants did not participate in the interviews and that they did not demonstrate the existence of a



statutory duty owed towards them by the respondent. In support of the submission, counsel relied on the case of *RV AG ex parte Jackson Munyalo* [2015] eKLR where it was held that

“An order of mandamus was not an order of specific performance... a party in a judicial review seeking an order of mandamus must show the existence of a statutory duty conferred or invested by statute upon some person, body of persons or tribunal which such person body of persons or tribunal has failed to perform.”

7. Concerning access to the information sought, counsel relied on the case of *Prof Njuguna S Ndung'u v Ethics & Anti-Corruption Commission & others* Pet 73 of 2014 where it was held that:

“It is now trite that before an application seeks orders from the court compelling the respondents to give him access to certain information, he must show that the said information was requested for.”

8. According to counsel the applicants had not demonstrated by way of evidence or otherwise that they ever sought for information as alleged from the respondents and that the respondents neglected to do so necessitating the filing of the application.

9. Ms Tigo further submitted that the outcome of the interviews were as per the respondents' annexures KK2 and KK3 before the court. The applicants never filed any further affidavits stating that the annexures were not true. This meant they were contented with the information contained therein hence the application was prematurely before the court.

10. The applicants herein filed a chamber summons on June 8, 2021 seeking among others leave to apply for orders of mandamus and prohibition. They further sought that the grant of leave operates as a stay. The prayers were granted by the High Court (Githinji J). The orders were to last pending the hearing of a substantive motion. The learned judge however did not indicate the duration within which the substantive motion was to be filed. The court has perused the file and noted that there is no such motion in the file and the same might not have been filed. This position was noted by counsel for the respondent who urged the court to bear that in mind.

11. Order 53(3) sub rule 1 provide that.

"3(1) When leave has been granted to apply for an order of mandamus or certiorari, the application shall be made within twenty-one days by notice of motion." (underlining mine)

12. The wording order 53(3) is couched in mandatory terms hence failure to comply is fatal to the application. As observed above, no such motion was ever filed meaning there is no substantive application before the court upon which the orders sought could be premised. In the circumstances the application is found to be fatally defective and is hereby struck out with costs.

13. The court will therefore not delve into the merit of the application.

14. It is so ordered

**DATED AND DELIVERED AT ELDORET THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2022**

**Abuodha Nelson Jorum**

**Judge ELRC**

