



**Rotich v Governor Trans- Nzoia County & 6 others (Petition
E001 of 2022) [2022] KEELRC 14671 (KLR) (23 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 14671 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KITALE
PETITION E001 OF 2022
NJ ABUODHA, J
DECEMBER 23, 2022**

BETWEEN

STEPHEN KIPLAGAT ROTICH PETITIONER

AND

THE GOVERNOR TRANS- NZOIA COUNTY 1ST RESPONDENT

TRANS-NZOIA COUNTY GOVERNMENT & 5 OTHERS 2ND RESPONDENT

RULING

1. The 1st, 2nd and 4th the respondents raised a preliminary objection to the effect that the gravamen of the Petition being interpretation of the *Constitution*, this court lacks the requisite jurisdiction to entertain the same since there was absent in the dispute, an “employer-employee” relationship. The right court according to Counsel for the respondents and Interested Parties ought to have been the Constitutional and Human Rights Division of the High Court.
2. Counsel further objected that the Petitioner disregarded the mandatory requirements of article 234(2) of the *Constitution*, section 77(2)(a) of the *County Government Act* as read with section 85 and 87(2) of the *Public Service Commission(County Appeals Procedures) Regulations*, 2022. According to Counsel the appointment process had been hijacked by the Petitioner whereupon he sought the court to undertake the County Assembly’s mandate. The issues raised by the Petitioner could be adjudicated by the 3rd respondent to whom the law delegates that authority under section 3, 4, 7, 8, and 10 of the *Public Appointments (County Assembly Approvals) Act*, 2017.
3. In support of the objection, Mr. Oringe for the 1st, 2nd and 4th Respondent submitted in the main that this court could only hear matters where there exists an “employer-employee” relationship between the parties. Counsel argued that there was yet to be such a relationship between the 2nd respondent and the interested parties hence the court lacked jurisdiction.



4. Concerning appeals to PSC, counsel submitted that section 77 of the *County Government Act* gives PSC the mandate to hear appeals on any decision relating to the recruitment, appointments, selection and qualification attached to any office in the County Government. Further under section 87(2) of the PSC Act, no suit is to be commenced until the appeal process provided for under the section has been exhausted. According to Counsel therefore, the petitioner bypassed these statutory provisions as well as regulations 4(c), 8, 9(a) and 10 of the *PSC (County Government) Appeals Procedures, 2022*.
5. Regarding vetting, Counsel submitted that vetting was yet to be conducted hence the Court ought to invoke the doctrine of avoidance and let the relevant Constitutional organs, in this case the 3rd respondent, to discharge its mandate. The appointment process is provided for under section 45(1) of the *County Government Act*.
6. Counsel for the Petitioner, Mr. Kathurima on the other hand submitted that the Petition challenged the violation of specific provisions of the *Constitution* and statute concerning the exercise of powers vested on the respondent in the process of appointment of Chief Officers. The process was intended to create employer-employee relationship between the interested parties and the 2nd respondent hence the dispute fell within the jurisdiction of the Court. In this regard Counsel relied on the case of *Clive Nyaaga Ogwora v Governor Nyamira County and 2 others*. Counsel further submitted that the Interested Parties are public officers within the meaning of article 260 of the *Constitution*. The process of their recruitment and remuneration establishes an employer-employee relationship. Regarding, the status of the Interested Parties as prospective employees, Counsel submitted that recruitment of prospective employees is an employment and labour relations matter hence the Court had jurisdiction.
7. Concerning the exhaustion principle, Counsel submitted that there were exceptions to this principle and in this respect relied on the case of *R v IEBC & others ex parte NASA* [2017] where the Court stated that it would intervene where the exhaustion principle would not serve the values enshrined in *the Constitution* or law. This was particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important Constitutional value is at stake. The court should also consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.
8. The court has briefly considered the submissions by Counsel on the preliminary objection and considering the urgency of the matter and the timelines for delivery of the ruling, will not delve deeply into the factual issues and legal principles around the objections by Counsel for the respondent and responses by Counsel for the Petitioner. On the issue of jurisdiction, the court acknowledges that it is everything. Without jurisdiction the court cannot proceed any step further. Counsel for the respondent has contended that there is no employer-employee relationship between the respondent and the interested parties. The court however takes a different view that looking at the process of recruitment and eventual remuneration of the interested parties, there is indeed in existence an employer-employee relationship. The positions in issues were advertised by the PSC, qualified candidates shortlisted and interviewed. The successful ones were recommended for appointment after vetting by the 3rd respondent. In the discharge of their functions, the interested parties will under the control and direction of the 4th respondent. To this extent, I am persuaded that they will ultimately be the employees of the 2nd respondent. The court is thus clothed with jurisdiction.
9. On the issue of the exhaustion principle, section 77 of the *County Government Act* provides:
 77. Appeals to the Public Service Commission
 - (1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported



exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the “Commission”) against the decision.

- (2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of—
 - (a) recruitment, selection, appointment and qualifications attached to any office;
 - (b) remuneration and terms and conditions of service;
 - (c) disciplinary control;
 - (d) national values and principles of governance, under Article 10, and values and principles of public service under article 232 of the *Constitution*;
 - (e) retirement and other removal from service;
 - (f) pension benefits, gratuity and any other terminal benefits; or
 - (g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.

10. The wording of the section is couched in non-mandatory terms. It uses the optional “may”. Which implies that it is not mandatory to appeal to the PSC over decisions made by the County Public Service Board. Whereas this may be the natural interpretation of the section, the exhaustion principle or doctrine however dictates that for good order, where a statute provides for internal dispute resolution mechanism, it desirable if not compulsory for a party to exhaust the internal process prior invoking the jurisdiction of the court. The rationale is well summarized in the case of *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR the court stated as follows;

“The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts.”

10. On the other hand it is equally important to bear in mind the observations in *R v IEBC & others ex parte NASA* case relied on by Counsel for the petitioner and note that there could be compelling circumstances as were outlined in the *NASA case* which makes it impractical to insist on the exhaustion principle.

10. The foregoing having been said, the question which arises is whether the petitioner has put forward a compelling case to merit an exception to the doctrine of exhaustion. The petitioner’s complaint is among others that from the list of nominees, the nominations do not take into account the regional and tribal balance and the youth contrary to the tenets of good governance as demanded by articles 10, 19, 20, 21(3), 22, 23, 35(1), 54, 55, 131(2) etc of the *Constitution*. According to the petitioner, the impugned list of 11 interested parties consists of 80% members of Luhya Community from Trans Nzoia County to the detriment of the other subtribes and communities in the County.



10. According to the 1st 2nd and 4th respondent, once the successful names from the interview have been recommended by the 4th respondent, the 1st respondent as a conveyor belt forwards them to respective sectoral Committees for vetting and approval hearing as per article 179(2)(b) of the Constitution, section 35(2) of the County Government Act, section 7 of the Public Appointments (County Assemblies Approval) Act and Standing Order number 42 of the County Assembly Standing Orders.
10. The Standing Order provides for the specific Committee of the 3rd respondent to notify the candidate and the general public of the time and place for the holding of the approval hearings. Members of the public are informed by the Clerk to the Assembly of their right to submit any information or comments on the suitability or otherwise of any of the candidates for appointment to the respective position.
11. According to the petitioner, the 1st respondent has nominated for appointment, 11 nominees for the position of Chief Officers from a list of 93 candidates shortlisted. The said list has been transmitted to the 3rd Respondent for vetting and approvals. As observed earlier, during the vetting and approval hearings, members of the public including the Petitioner are invited to submit information and memoranda on the suitability or otherwise of any candidate for appointment. The petitioner has not states whether he has submitted or has been prevented from submitting, any information or memoranda containing the allegations forming substance of this Petition. Further, the petitioner has not sufficiently made a case for egregious violation of the Constitution or the applicable law to warrant interference by the Court. To this extent the Court upholds the objection by the respondent that this Petition has been prematurely brought and the issues raised herein are speculative and within the mandate of the 3rd Respondent to consider during the vetting process.
10. The Petition is therefore found without merit and is hereby struck out with no order as to costs for the reason that the respondent is partially successful and the Petition was brought in the interest of the public.
17. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF DECEMBER, 2022

ABUODHA NELSON JORUM

JUDGE ELRC

