



REPUBLIC OF KENYA



KENYA LAW
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Odemba v Governor, County Government of Homa Bay & 3 others (Petition E046 of 2022) [2022] KEELRC 13454 (KLR) (8 December 2022) (Judgment)

Neutral citation: [2022] KEELRC 13454 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E046 OF 2022

S RADIDO, J

DECEMBER 8, 2022

**IN THE MATTER OF THREATENED INFRINGEMENT
AND CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES
2, 10(1), 10(2), 19, 22, 23(3), 35, 47, 73(2) AND 232
OF THE CONSTITUTION**

AND

**IN THE MATTER OF ALLEGED INFRINGEMENT OF RIGHTS AND FREEDOMS UNDER
ARTICLES 1(1), 2(1) & (2), 3(1), 10(1), 27, 73(2) AND 232 OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THREATENED VIOLATION OF
SECTIONS 57, 58, 58A, 58A(1), 59 AND 91 OF THE
COUNTY GOVERNMENTS (AMENDMENT) ACT, 2020**

AND

**IN THE MATTER OF THREATENED VIOLATION OF SECTIONS 7
AND 8 OF THE PUBLIC APPOINTMENTS (COUNTY ASSEMBLIES
APPROVAL) ACT**

BETWEEN

PATRICK OKUKU ODEMBA PETITIONER

AND

GOVERNOR, COUNTY GOVERNMENT OF HOMA BAY 1ST RESPONDENT
HOMA BAY COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT



JUDGMENT

1. On September 6, 2022, the Governor County of Homa Bay (the Governor) advertised for the position of members of the County Public Service Board (the Board).
2. The advertisement was followed by another notice dated October 4, 2022 from the office of the Governor inviting applications to be submitted to a selection panel by the close of October 11, 2022.
3. On a date which is not clear, the office of the Governor published the names of shortlisted candidates, with interviews scheduled for November 19, 2022 and November 20, 2022.
4. In the meantime, the Board had, on September 28, 2022, advertised for positions of Chief Officers and Deputy Directors within the county public service.
5. Patrick Okuku Odemba (the petitioner) thought that the process was unlawful, and on November 23, 2022, he lodged a petition with the court seeking orders:
 - (a) A declaration that the 1st respondent's failure to allow public participation violates article 10(2) (a) and (c) of the [Constitution of Kenya, 2010](#), which provides for the participation of the people in good governance, integrity, transparency and accountability and article 35 of the [Constitution of Kenya, 2010](#) which provides for the right of the people to access important information affecting the nation, was against the letter and spirit of the [Constitution of Kenya, 2010](#).
 - (b) A declaration that the 1st respondent's recruitment and selection of the intended members of the Public Service Board violated article 10(2)(a) and (c) of the [Constitution of Kenya](#), which provides for the participation of the people in good governance, integrity, transparency and accountability and article 35 of the [Constitution of Kenya, 2010](#) which provides for the right of the people to access important information affecting the nation, was against the letter and spirit of the [Constitution of Kenya, 2010](#).
 - (c) A permanent injunction be hereby issued to prevent the implementation of the respondents' decision to recruit and select the intended members of the public service board without following due procedure right from the inception to the end as provided under article 10(2)(a) and (c) of the [Constitution of Kenya, 2010](#) which provides for the participation of the people in good governance, integrity, transparency and accountability and article 35 of the [Constitution of Kenya, 2010](#).
 - (d) An order prohibiting all the selected persons from acting in their capacities as members of the public service board as they have not gone through due process for their appointments.
 - (e) An order compelling the respondents hereon to forthwith re-start the nomination and appointment process competitively, transparently, fairly through public participation, in an open manner and with due regard to the procedure provided by the law and within the spirit and meaning of chapter 6 on leadership and integrity, article 10(2)(a) and (c) of the [Constitution of Kenya, 2010](#) which provides for the right of the people to access important information affecting the nation.



- (f) Any other or further remedy that the honourable court shall deem fit to grant.
- (g) An order that the respondents do pay the costs of the petition.
6. The petition was accompanied by a motion that the court certified urgent on the same day. The court gave detailed directions, including filing and exchanging pleadings and submissions (the submissions were filed on December 1, 2022).
7. At the same time, the court issued a temporary injunctive order staying the recruitment process ahead of further proceedings on December 1, 2022.
8. When the petition was called out on December 1, 2022, the respondents were not represented and, because the court was not satisfied with the evidence of service, directed new service to be effected with a return date of December 5, 2022.
9. On December 5, 2022, the respondents were again not represented. The petitioner informed the court that he had served through email and courier. The service was confirmed through an affidavit of service on record.
10. The instant petition primarily challenges the recruitment process for members of the selection panel to recruit members of the county public service board (the court is seized of a petition where the recruitment process for Chief Officers, Directors and Deputy Directors has been challenged).
11. The grounds mounted by the petitioner in challenging the process were briefly that the mandate to recruit members of the Board was reserved to a selection panel under section 58A(1) of the *County Governments Act*; that the Governor had thus usurped the role of the selection panel; the Board had advertised for positions of Chief Officers and Directors on September 28, 2022 when it was not validly constituted; recruitment for Board members was conducted before interviews for Chief Officers and Directors; that the interviews for the Board members were held over the weekend which are not working days; that the Governor had illegally appointed the 4th respondent as Chief Executive Officer of the Board yet she was not qualified and was also serving substantively as a Chief Officer; that the court had in petition No 42 of 2019, *Daniel Omondi Ogada & others v County Assembly of Homa Bay & others*, decreed the persons who constituted the Board and that there was a risk of unlawful expenditure of public resources.
12. The court has considered the petition, motion, affidavits, and submissions.
13. There appears to be a disconnect between the prayers sought by the petitioner and the grounds advanced in support of the remedies.
14. The remedies sought appear to be faulting the lack of public participation in the recruitment process for members of the Board.
15. Some of the grounds advanced are immaterial to the prayers.
16. It cannot be disputed that by the time the petitioner moved the court on November 23, 2022, the timelines for interviews for the candidates who had applied for membership of the Board had passed since the interviews were to be conducted on November 19, 2022 and November 20, 2022.

Selection Panel and the Role of the County Assembly

17. Sections 58 and 58A of the *County Governments Act* outline the recruitment process of members of a county public service board.



18. Some of the requirements are that the Governor appoint members of a selection panel after approval of the County Assembly.
19. In this regard section 58A(1) of the Act provides:

"Whenever a vacancy arises in a county public service board, the governor shall nominate and, with the approval of the county assembly, appoint members to a selection panel for the purpose of selecting suitable candidates for appointment as members of the county public service board."
20. The *Public Appointments (County Assemblies Approval) Act, 2017*, contextualises the County Assembly's role in approving the nominated persons as part of the recruitment process.
21. There is no evidence before the court that the Governor appointed and that the County Assembly approved members of the selection panel to recruit members of the Board.
22. On that singular ground, the court is of the view and concludes that the petition should succeed.

Public Participation

23. The petitioner also impugned the recruitment process because there was no public participation.
24. The court has keenly perused the *County Governments Act*.
25. The relevant provisos do not make any reference to public participation during the phase led by the selection panel. The requirement under section 58A(7) of the Act is for the Governor to forward the names of the nominees to the County Assembly for approval.
26. In carrying out the approval function, the County Assembly is supposed to be guided by sections 4, 5, 6, 7, 8, 9, 10 and 11 of the *Public Appointments (County Assemblies Approval) Act*.
27. Under the Act, public participation is engendered as part of the approval hearings by the County Assembly and its relevant committees.
28. The recruitment process was challenged while in its initial stages before the requirement for the public participation had accrued during the approval hearings by the County Assembly.
29. The court, therefore, holds that public participation had not actualised.
30. The court does not find the other grounds raised by the petitioner as having a bearing on the recruitment process for members of the selection panel.

Appointment of 4th Respondent to Act as Chief Executive Officer of the Board

31. The petitioner did not seek any substantive order on this head of the claim and the court will not examine it.

Conclusion and Orders

32. Flowing from the above, the court issues the following orders:
 - i. A declaration be and is hereby issued that the recruitment and appointment of the members of the selection panel violated section 58A(1) of the *County Governments Act* as read with sections 4 and 5 of the *Public Appointments (County Assemblies Approval) Act*.



- ii. An order of injunction is hereby issued quashing the recruitment process for members of the County Public Service Board as commenced through the advertisements of September 6, 2022 and October 4, 2022.
- iii. An order be and is hereby issued compelling the respondents herein to forthwith re-start the nomination and appointment process competitively, transparently, fairly through public participation, in an open manner and with due regard to the procedure provided by the County Governments Act and the Public Appointments (County Assemblies Approval) Act.

33. The petition was in the public interest. No order on costs.

DELIVERED VIRTUALLY, DATED, AND SIGNED IN KISUMU ON THIS 8TH DAY OF DECEMBER 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioner Okatch & Partners Advocates

Respondents did not participate

Court Assistant Chrispo Aura

