



**John Major Mukenya & another v Lusaka & 2 others (Constitutional Petition E009 of 2022) [2022] KEELRC 13373 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13373 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CONSTITUTIONAL PETITION E009 OF 2022**

**JW KELI, J**

**DECEMBER 2, 2022**

**ON APPLICATION DATED 26TH OCTOBER 2022 SEEKING CONSERVATORY  
ORDERS AGAINST RECRUITMENT OF COUNTY CHIEF OFFICERS**

**BETWEEN**

**JOHN MAJOR MUKENYA ..... 1<sup>ST</sup> PETITIONER**

**PHILIP WANYONYI WEKESA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**HON KENNETH MAKELO LUSAKA ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF BUNGOMA ..... 2<sup>ND</sup> RESPONDENT**

**THE COUNTY PUBLIC SERVICE BOARD BUNGOMA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Petitioners who state they are Kenyan adults of sound mind and registered voters and residents of Bungoma County through the law firm of Mwamu and Company Advocates brought the instant Petition dated 26<sup>th</sup> October 2022 under certificate of urgency seeking the following reliefs:-
  - a. A declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have violated the Constitution and the County Government Act.
  - b. A declaration executive order No. 2 of 2022 are illegal, unprocedural and discriminatory.
  - c. The Respondents to pay the Petitioner Costs of the Petition in any event.
2. The Petitioner simultaneously filed Notice of Motion application dated 26<sup>th</sup> October 2022 seeking issuance of conservatory orders restraining the respondents from recruitment of county chief officers pursuant to the Bungoma County Executive Order No. 2 of 2022.



3. The Application was opposed. The 2<sup>nd</sup> Respondent filed replying affidavit of Joseph Wakoli Wambati the county Secretary dated 10<sup>th</sup> November 2022 and a supplementary affidavit dated 22<sup>nd</sup> day of November 2022.
4. The 1<sup>st</sup> Respondent swore a replying affidavit dated 14<sup>th</sup> November 2022 to justify the impugned Executive Order No. 2 of September 2022.
5. The Court directed hearing interpartes of the issue of interim order pending the hearing. The court having heard the parties ordered status quo to be maintained pending the determination of the application.
6. The court then directed the application be canvassed by way of written submissions.
7. The 1<sup>st</sup> Respondent filed its written submissions drawn by Makhokha Wattanga and Luyali Associates dated 18<sup>th</sup> November 2022 received in court on the 22<sup>nd</sup> November 2022.
8. The 2<sup>nd</sup> Respondent filed its written submissions drawn by Cyril S. Wayongo dated 16<sup>th</sup> November 2022 received in court on the 17<sup>th</sup> November 2022.
9. On 30<sup>th</sup> November 2022, after the mention to confirm compliance, the court receive submissions by the Applicant dated 29<sup>th</sup> November 2022 and drawn by Mwamu & Company Advocates which were duly admitted.
10. Still on 30<sup>th</sup> November 2022, the court further received further affidavit in support of the application sworn by 1<sup>st</sup> Petitioner on even date.
11. In a surprise turn of events same day of 30<sup>th</sup> November 2022 the court further received affidavit of protest sworn by Philip Wanyonyi Wekesa, the 2<sup>nd</sup> Petitioner herein, stating that the instant petition and the application had been brought to his attention by members of the media. That he had not filed the petition or consented to its filing by the 1<sup>st</sup> petitioner nor had he instructed the lawfirm of Mwamu & Co. advocates to represent him in the petition. That he had never worked in the county as chief officer to enable it terminate his service. That the directorate of criminal investigations should be ordered to investigate how his name was used in the petition. The affidavit was filed after close of the submissions hence no opportunity for the accused lawfirm to respond.

### **Decision on merits of the application**

#### **The Brief Relevant Facts**

12. From the Applicant's pleadings, the applicants state that based on the impugned Executive order [the Governor] is in the process of making new appointments under the illegal Executive Order No. 2 of 2022 which expanded the executive government without authority of the county executive committee. This could be an indication that Executive Order no. 2 of 2022 has more departments than its predecessor, Executive Order No. 1 of 2014. This means that Executive Order No. 2 of 2022 is seeking to introduce new departments which were not there before.
13. From the respondents' pleadings the impugned Executive Order (Executive Order No. 2 of 2022) supersedes Executive Order No. 1 of 2014. Based on the affidavits of the respondents, 18 departments had been established under the now-superseded Executive Order No. 1 of 2014. The impugned order provides for 19 departments an increase by one. The further affidavit of the 1<sup>st</sup> petitioner filed on 30<sup>th</sup> November 2022 denies that the predecessor government had 18 departments and states they were 10 chief officers without any supporting documentary evidence. The court finds that he who alleges must



prove. The respondents are the custodian of records hence the court gives them the benefit of doubt to find there were 18 chief officers under the predecessor county government.

### **Jurisdiction to grant of conservatory orders**

14. Article 162(2) Of *the Constitution* creates the court. Section 12 of the *Employment and Labour Relations Court Act* defines the jurisdiction of the Court to wit- '(1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —
  - (a) disputes relating to or arising out of employment between an employer and an employee;
  - (b) disputes between an employer and a trade union;
  - (c) disputes between an employers' organisation and a trade unions organisation;
  - (d) disputes between trade unions;
  - (e) disputes between employer organizations;
  - (f) disputes between an employers' organisation and a trade union; (g) disputes between a trade union and a member thereof;
  - (h) disputes between an employer's organisation or a federation and a member thereof;
  - (i) disputes concerning the registration and election of trade union officials; and
  - (j) disputes relating to the registration and enforcement of collective agreements”
15. Counsel for the applicant relies on the decision of the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Gitthinji and 2 others* (2014)e KLR on the principles to apply for grant of conservatory orders as follows:- '[86] “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”(emphasis mine)
16. The applicants submits that the principles were reiterated in *Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)* [2020] eKLR and *Center For Rights Education And Awareness(CREAW) & 7 Others V Attorney General* (2011)e KLR.
17. The Supreme Court decision being binding on the court. The court upholds the decision in Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Gitthinji and 2 others* (2014)e KLR to apply in the instant application to extent that the principles to apply in consideration of the application are the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

Whether there is a limit on the number of chief officers that can be appointed in the county government.



18. My Analysis is that the law does not limit the number of chief officers to be appointed in the county government, but it has procedures on how to create departments in a county government under section 46 of the *County Governments Act*.
19. In my view, it appears that the central issue, in this case, is the creation of additional department. Given that each department is headed by a chief officer, the focus should not be on the number of officers, but rather on the number of departments in a county government. This brings us to the question of whether the additional departments were established procedurally and in compliance with the law. This question is important to the current case because, if the additional departments were established in contravention of the law, then the executive order is consequently illegal.
20. The procedure for creating new county departments is clearly articulated under the *County Governments Act*, 2012 Section 46;

“ 46.

- 1) The County Executive Committee shall determine the organization of the county and its various departments and for that purpose may—
  - a. establish, continue or vary any department, and determine the objects and purposes of the department;
  - (b) determine the number and nature of departments at the decentralized units;
  - (c) c) abolish any department; and
  - (d) determine or change the name of any department.
- (2) When establishing and organizing the county, the county executive committee shall take into account, and be guided by, the need to —
  - a) be responsive to the needs of the local community and the functions and competencies assigned to and transferred to the county;
  - (b) facilitate a culture of public service and accountability in the county public service;
  - (c) be performance oriented and focused on the objects of devolved government set out in Article 174 of *the Constitution*;
  - (d) ensure that the county departments align their roles and responsibilities with the priorities and objectives set out in the county’s policies and plans;
  - (e) organise its departments and other structures in a flexible way in order to respond to changing priorities and circumstances;
  - (f) assign clear responsibilities for the management and coordination of departments and functions;(g) allow participatory decision making as far as is practicable; and
  - (h) provide an equitable, fair, open and non-discriminatory working environment.”



21. The attention of the court must be drawn to section 46. (1) (a) and (b) which stipulate that;
- “The county executive committee .... May:-
- a. establish any department
  - b. determine the number and nature of departments at the decentralized units”
22. My understanding of the above-highlighted provision and the entire section 46 is that a determination of the number of departments in a county government, and the decision on the creation of new departments are purely the preserve of the county executive committee. The law leaves these decisions entirely in the hands of the county executive committee.
23. Whether the executive order by the 1<sup>st</sup> Respondent is legal
24. A determination on the validity of the Executive Order no. 2 of 2022 can only be resolved by investigating whether the provisions of the order were sanctioned by the county executive committee. The Governor does not, by himself, have powers to establish new departments or determine the number of departments in a county government. These powers are the prerogative of the county executive committee. The Governor is a member of the said committee and that means its the decision of the County Executive Committee. The petitioners submit that the powers to reorganise the chief officers and departments are not under governors docket. Under Section 46 of the county governments act the role of reorganisation of departments which each has a chief officer as accounting officer falls under the county executive committee. The court finds that submission that the reorganisation role falls under county public service boards not true applying section 46 of the county governments act. The board only comes in for recruitment and related human resources function under section 59 of the county government act. I find that the departments under which the chief officers are appointed do not fall under offices envisaged under section 59(a) of the county governments act. That position is consistent with the decision of the court of appeal relied on by the applicant in Kisumu County Public Service Board And Another V Samuel Ekuro & Others (2018)e KLR on the powers of the county public service boards acting on behalf of the county government to deal with recruitment of persons holding county public service offices.
25. My analysis is further supported by the holding of the High Court in the case of Fredrick Njeru Kamunde v Tharaka Nithi County Government & another [2016] eKLR. In the case, the court relooked at the powers of the governor to reshuffle departments of a county government. In holding that the Governor cannot unilaterally reorganize the departments without the involvement of the county executive committee, the court held as follows; ‘In view of the two provisions of the Act, the court holds that the power and function to reorganize the departments of the county government is shared between the governor and the county executive committee and in this case it was not shown that the committee discharged its roles as envisaged in section 46 of the Act prior to the reorganization of 24.04.2015 so that the 2nd respondent appears to have acted unilaterally contrary to provisions of section 46 of the Act.
26. A similar holding was arrived at by the High Court in the case of Cecilia Wangechi Ndung’u v County Government of Nyeri & another [2016] eKLR. In this case, the governor had unilaterally restructured the departments in the County Government of Nyeri from 10 departments to 9, as a result of which the applicant was removed from office. She challenged the abolition of the office for being unlawful. The court considered the powers of the Governor to re-organize departments of the county government, and held that; The court considers that in view of the provisions of section 30(2) and section 46 of the Act, the power and function of reorganising the departments of the county executive are shared



- between the governor and the executive committee. In the present case it was not shown that prior to the reorganisation in issue, the committee performed the roles as envisaged in section 46 of the Act. The court particularly holds that a resolution by the committee in terms of the functions set out in section 46 of the Act was a mandatory precondition before the reorganisation could be valid and lawful and the governor's unilateral decision as it happened was not legitimate.”
27. The upshot of my analysis is that, the 1<sup>st</sup> respondent's Executive Order No. 2 of 2022 is legal if the decision to have 19 departments was a resolution of the county executive committee. Assuming that the order seeks to establish new departments which were non-existent before, the Governor's order is legal if the additional departments were established by the county executive committee.
  28. Thus, the determining factor in this matter is whether the executive order was preceded by a meeting and resolutions of the county executive committee during which the 19 departments were arrived at and the new department was established. The 1<sup>st</sup> Respondent, the Governor, swore affidavit dated 14<sup>th</sup> November 2022 reiterating his constitutional and statutory powers and in the upshot averred that in furtherance of his responsibilities and functions under the law he issued the Executive Order No. 2 of 2022 on the 7<sup>th</sup> September 2022. The 1<sup>st</sup> Respondent denied expansion of the executive government of the county stating his predecessor his Excellency Wycliff Wangamati had 18 departments.
  29. The County Secretary and head of Public Service Bungoma County swore affidavit dated 10<sup>th</sup> November 2022 and denied that the Executive Order had expanded the Executive Government stating the predecessor government had 18 departments.
  30. The impugned Executive Order dated 7<sup>th</sup> September 2022 (exhibit JMM3) establishes 19 departments. The predecessor government had established 18 as admitted by the respondents. The Court finds and determines there was expansion of the executive government by one department. The County Secretary in paragraph 10 of his affidavit of 10<sup>th</sup> November 2022 averred that the County Executive Committee were to be vetted on 5<sup>th</sup> November 2022. The Court finds and determines that there was no County Executive Committee approval of the expansion of the departments of the county executive from 18 to 19 determines as at time of filing the instant petition and application.
  31. Finally, my analysis of the law is that each county by Government department ought to have one chief officer, who is the accounting officer. Chief Officers are the authorized and accounting officers for departments within the County Government as contemplated by Sections 2, 45, and 46 of the County Government Act and Public Finance Management Act. The County Government Act, 2012 section 45 (1) provides;
 

‘(3) A county chief officer shall be responsible to the respective county executive committee member for the administration of a county department as provided under section 46.’
  32. The Court from the foregoing analysis find and holds that the executive order by H.E. HON. Kenneth Makele Lusaka, Governor Bungoma County, of 7<sup>th</sup> September 2022 increased the departments of the county executive from 18 to 19. That the said expansion was not approved by the county executive committee contrary to the provisions of section 46 of the County Governments Act of 2012 which reads:- ‘ the County Executive Committee shall determine the organisation of the county and its various departments and for the purpose may -a. establish , continue or vary any department and determine the objects and purposes of the department....’ and was thus illegal.
  33. The Court on this finding is persuaded by the court decisions in Cecilia Wangechi Ndung'u v County Government of Nyeri & Another [2016] eKLR and in Fredrick Njeru Kamunde v Tharaka Nithi County Government & another [2016] e KLR(SUPRA). In the instant case, the court relooked at the powers of the governor to reshuffle departments of a county government. In holding that the



Governor cannot unilaterally reorganize the departments without the involvement of the county executive committee.

34. In view of the two positions held by the 1<sup>st</sup> respondent of Governor and member of county Executive Committee the court holds that the power and function to reorganize the departments of the county government is shared between the governor and the county executive committee and in this case it was not shown that the committee discharged its roles as envisaged in section 46 of the Act prior to the reorganization under Order No. 2 of 2022 so that the 1<sup>st</sup> respondent appears to have acted unilaterally contrary to provisions of section 46 of the Act.

35. The Court holds and determines that 1<sup>st</sup> Respondent could not unilaterally reorganize the departments by increasing the numbers under his Executive Order No, 2 of 2022 dated 7<sup>th</sup> September 2022 without the involvement of the county executive committee as that was in breach of the mandatory provisions of Section 46 of the County Governments Act cited above.

36. What is the fate of the said Executive Order No. 2 of 2022.

37. The 2<sup>nd</sup> Respondent submits that the reorganisation of the executive structure especially ones dealing with chief officers of the county government is not an administrative function but policy decision. That during the transition period the Governor was well within his powers to issue the executive Order number 2 of 2022 designating 10 County Executive Committee members as per Article 179(3)(b) of the Constitution and 19 departments headed by the chief officer. That during the transitional period (from date of swearing in the new Governor to date of swearing in new County executive committee members) the executive authority to issue policy decisions vests in the new governor, and he may do so to best ensure his new government operates, pending the approval and swearing in of the new county executive committee members. That in any case the county Government is a body corporate with perpetual succession and once the new government is fully constituted it has power to ratify any decisions such as the issue of Executive Order No, 2 of September 2022 undertaken during the transition period.

38. While the Application was pending before the court the 2<sup>nd</sup> respondent county secretary Joseph Wakoli Wambati filed in court supplementary replying affidavit sworn on the 22<sup>nd</sup> November 2022 stating among others that the 1<sup>st</sup> respondent convened the inaugural county executive committee meeting of the 2<sup>nd</sup> respondent on the 21<sup>st</sup> November 2022 where in the county executive committee approved by way of retrospective ratification the county executive re-organisation as set out in executive order No. 2 of September 2022 in compliance with section 46 of the County Governments Act(JWW2 being a copy of the extract of minutes of the meeting). The court holds that the said ratification was admission by the respondents that the executive order No. 2 of 2022 was in breach of section 46 of the County Governments Act.

39. The question then left for the court to address is whether the said ratification cured the illegality in the decision of the 1<sup>st</sup> respondent in publishing the Executive Order No. 2 of 2022 and ought to be allowed to stand. The applicant submits that subsequent ratification of the executive order was admission of the illegality of the executive order no. 2 of 2022 and the court so found. The applicant does not address the effect of the resolution of the county executive committee in ratifying the decision of the 1<sup>st</sup> respondent.



40. The doctrine of ratification was best explained in *Wilson v Tumman* (1843) 6 Man & G 236, where the UK Court of Common Pleas stated that:
- “an act done, for another, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him.”
41. The exercise of the powers under section 46 is corporate between the 1<sup>st</sup> Respondent and the county executive members to wit :- the county executive committee shall determine the organisation of the county and its various departments and for the purpose may –
- a. establish , continue or vary any department and determine the objects and purposes of the department....”
42. Evidence was placed in court vide minutes of the county executive committee meeting held on 21<sup>st</sup> November 2022 with 10 members including the 1<sup>st</sup> Respondent. The 4<sup>th</sup> agenda of the said meeting was;- ‘Consideration of the County Executive Re- Organisation and retrospective approval of executive order No. 2 of 2022.’ There is recording of resolution of the meeting to wit:- ‘the cabinet after due consideration resolved to retrospectively approve the County Executive re- organisation as set out in the Executive Order Number 2 of September 2022 with the amendments set out above.’”
43. The doctrine of ratification was upheld by the Court of Appeal in *East African Safari Air Limited v Anthony Ambaka Kegode & another* [2011] eKLR where it held:- “It is our view that the proper thing for the High Court to have done was not to strike out the proceedings, but to stay the same pending ratification if it was of the view that the evidence of ratification was not clear. Here is what Palmer states: -
- “If an individual shareholder, without authority to do so, initiates litigation in the name of the company, the normal practice upon a motion to strike out the company’s name is for the court to adjourn, whilst ordering that a meeting of the shareholder’s be held to see if the company supports the litigation. If it does not, the motion will succeed and the solicitor who commenced the proceedings without authority of the company will be personally liable for the defendant’s costs.”
44. The County Executive Committee of Bungoma County exercised its powers under section 46 of the *County Governments Act* and with modification ratified the decision of the 1<sup>st</sup> respondent in meeting held on the 21<sup>st</sup> November 2022. The court found no limitation is placed on the number of the chief officers that than be engaged under section 46 of the *County Governments Act*. The applicant did not cite any law limiting the numbers other than to state that they exercise delegated powers from the county executive member hence should not exceed 10 being the capped number of county executive members under Article 179(3)(b) of *the Constitution*. The court finds whereas the county government departments are aligned to the county executive members limited to 10, there is no limitation on number of departments which are headed by chief officers as accounting officer hence logically the number of chief officers is determined by the number of established departments by the county executive committee.
45. Applying the doctrine of ratification in *Wilson v Tumman* (1843) 6 Man & G 236, where the UK Court of Common Pleas and by the Court of Appeal in *East African Safari Air Limited v Anthony Ambaka Kegode & another* [2011] eKLR (SUPRA) to extent that an irregular decision can be ratified



while the court proceedings are ongoing, the court holds that the ratified Executive Order No. 2 of 2022 by the 1<sup>st</sup> Respondent now stands to be in compliance with section 46 of the County Governments Act.

Whether the expansion of executive government vide the Executive Order No. 2 of 2022 violated public expenditure law and policies or the Constitution.

46. The Applicant alleged that the expansion was in contravention of Public Finance Act and the Public Finance Principles. No specific provisions of the said statutes were cited. The grounds of the application simply state that the hiring of the said chief officers will lead to expansion of the executive in total contravention of Public Finance Act and the public finance principles.
47. In the affidavit of the 1<sup>st</sup> petitioner was to effect that the restructure of government would result into more chief officers which translates to more salaries and ballooned wage bill which currently stand at 46.7%.
48. This being a Constitutional Petition the petitioners ought to have pleaded with precision the constitutional provisions threatened or violated by the respondents to enable them response. The court agrees with the Respondents that this was not the case as held in the old gem decision on constitutional threshold of petitions in Anarita Karimi Njeru v Republic of Kenya(No.1)(1978).
49. The Court finds evidence before it that the departments were increased by one from 18 under the predecessor government. The court found the alleged ballooning wage is just alarmist without data backup. The applicant did not cite any law limiting the number of departments or chief officers to be appointed. Section 46 of the County Governments Act does not limit the departments that can be established. The court wishes to point out that its decision must always be rational as held by Court of Appeal in Mumo Matemo vs. Trusted Society of Human Rights Alliance & 5 others (2013) eKLR where the Court stated; - The rule that executive decisions may be set aside only if they are irrational and may not ordinarily be set aside because they are merely unreasonable or procedurally unfair has been adopted precisely to ensure that the principle of the separation of powers is respected and given full effect. If executive decisions are too easily set aside, the danger of courts crossing boundaries into the executive sphere would loom large.”
50. The court finds no irrationality on the decision to increase the number of departments by 1 from the previous order. On a balance of probability and having found that the decision of the 1<sup>st</sup> respondent in Executive Order No. 1 of September 2022 had since been ratified by the county executive committee under section 46 of the County Governments Act, the court finds no irrationality or violation of any specific provision of the Constitution in the expansion of the county government to persuade it to exercise discretion and stay the recruitment of the chief officers as advertised.
51. The Court holds that it must exercise restraint in interfering with exercise of power by the other arms of government as determined by the Supreme Court decision in Justus Kariuki Mate & Another –vs- Martin Nyaga Wambora & Another [2017] eKLR in which the Supreme Court set out the guiding principles to be applied by courts while observing the doctrine of separation of powers as follows:-

“From the course of reasoning emerging from such cases, it is possible to formulate certain principles, as follows:-

- “(a) each arm of Government has an obligation to recognize the independence of other arms of Government;
- (b) each arm of Government is under duty to refrain from directing another Organ on how to exercise its mandate;



- (c) the Courts of law are the proper judge of compliance with constitutional edict, for all public agencies; but this is attended with the duty of objectivity and specificity, in the exercise of judgment;
- (d) for the due functioning of constitutional governance, the Courts be guided by restraint, limiting themselves to intervention in requisite instances, upon appreciating the prevailing circumstances, and the objective needs and public interests attending each case;
- (e) in the performance of the respective functions, every arm of Government is subject to the law.”

52. The Court holds that the oversight role over the exercise of powers by the 1<sup>st</sup> respondent and the county executive committee lies with the County Assembly of Bungoma. Pursuant to the Supreme Court decision in *Justus Kariuki Mate & Another -vs- Martin Nyaga Wambora & Another* [2017] eKLR the proper avenue to challenge the expansion of the executive government on basis of public resources must be the County Assembly of Bungoma to enable it exercise its mandate under section 8 of the *County Governments Act* to wit:-

“8. Role of the county assembly (1) The county assembly shall— (a) vet and approve nominees for appointment to county public offices as may be provided for in this Act or any other law; (b) perform the roles set out under Article 185 of *the Constitution*; (c) approve the budget and expenditure of the county government in accordance with Article 207 of *the Constitution*, and the legislation contemplated in Article 220(2) of *the Constitution*, guided by Articles 201 and 203 of *the Constitution*; (d) approve the borrowing by the county government in accordance with Article 212 of *the Constitution*; (e) approve county development planning; and (f) perform any other role as may be set out under *the Constitution* or legislation.”

53. The Court holds that the legislature has equipped the county assemblies with powers to oversight expenditure of the County Government. The court would be in violation of the doctrine of separation of powers of government and acting in overreach if it were to find the expanded government affects or contribute to ballooning wage bill of the county. That is not the mandate of the court. section 15 of the *County Governments Act* provides for Right to petition county assembly to wit :- “(1) A person has a right to petition a county assembly to consider any matter within its authority, including enacting, amending or repealing any of its legislation.” That is a clear procedure which must be exhausted on any grievance on expenditure of the executive government of the Bungoma County. see *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR

54. In the upshot the court finds and determines that the Bungoma County Executive Committee having since ratified the Executive Order No. 2 of September 2022 by the 1<sup>st</sup> Respondent and the number of the departments under the county executive government being unlimited under section 46 of the *County Governments Act*, the court finds that it has no basis to grant conservatory orders to restrain the proposed recruitment of the chief officers by the respondents and vacates its interim order of 22<sup>nd</sup> November 2022.

55. The application dated 26<sup>th</sup> October 2022 is dismissed.

56. Who bears costs of this application

Section 12(4) of the *Employment and Labour Relations Court Act* to wit:- ‘In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.’”



57. The purported 2<sup>nd</sup> Petitioner filed affidavit of protest on the petition but there was no opportunity for response by the co petitioner or the lawfirm. The said further affidavit was filed without leave of the court hence its merits cannot be considered in the instant ruling. The court held there was an irregularity in the Executive Order No. 2 of 2022 as at time of filing the instant suit. That court held that the irregularity was cured by the subsequent ratification resolution of the county executive committee on the 21<sup>st</sup> November 2022 while the application was pending in court.
58. In the circumstances the court exercises its discretion and grants costs of the application to the petitioners.
59. The Petitioners to take steps in disposition of the petition.
60. It is so ordered.

**DATED, SIGNED AND DELIVERED ON THE 2<sup>ND</sup> DECEMBER 2022 AT BUNGOMA.**

**J.W. KELI,**

**JUDGE.**

**In the presence of:-**

**Court Assistant:- Brenda Wesonga**

**Petitioners /Applicants – Mr. Mwamu Advocate**

**1<sup>st</sup> Respondent :- Cyril S. Wayong'o, County Attorney h/b Mr. Makhokha Advocate**

**2<sup>nd</sup> Respondent:- Cyril S. Wayong'o, County Attorney**

