



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

PETITION NO.10 OF 2019

(Before D.K.N.Marete)

COUNTY ASSEMBLY OF EMBU.....PETITIONER

VERSUS

EMBU COUNTY PUBLIC BOARD.....RESPONDENT

JUDGMENT

This is a petition dated 2nd December 2019. It comes out as follows;

The complaint:

The Petitioner avers that in the year 2019, it approved the County budget for the financial year 2019/2020 providing for all approved expenditure by the County Government and details of how devolved funds in the County ought to be applied and used. This is in the Respondent's domain and knowledge.

It is the Petitioner's further case that Section 59(1)(a) of the County Government Act, 2012 provides the Respondent with the power and mandate to establish offices in the County Public Service and that no position can be competently filled before it is established by the Respondent as provided for by law.

The Petitioner's other case is that Section 60(1) (g) of the County Government Act, 2012 provides that in creating a position in the County Public service, regard must be had that funding for such post is provided for.

She further puts her case as follows;

22. The petitioner avers that being aware of the budgetary constraints within the county and being enjoined to ensure prudent use of county funds, it expressly recommended by way of a resolution approving expenditure within the county, that further recruitment of staff within the county public service be stopped unless and until approved by the county assembly and funds are provided in the budget to fund such a position.

23. The petitioner states that the respondent did on the 12th November 2019, advertise in the print media and called for applications for persons to fill over one hundred and fifty (150) positions in the Embu County Public Service as set out in the said advert. The details of the advertisement are well within the respondent's knowledge and record.

24. The petitioner avers that the said advertisement and intended recruitment of persons to the Embu County Government is unlawful, irregular and unconstitutional for reason that the said positions have not been established by the respondent and further there is no budgetary provision for the same in the approved budget for the year 2019-2020 and the appropriations law for the same period, as passed by the County Assembly.

The Petitioner in the penultimate avers that the Respondent's action in advertising for the positions set out in the advert on the daily press on 12th November, 2019 is against public policy on the reduction of recurrent expenditure through unmitigated and unapproved recruitment of persons to the County Public Service and a hurried indicative of a clear scheme to reward political cronies, supporters and otherwise use the county public services for political ends instead of general public interest and good.

She prays as follows;

i) *THAT* this Honourable court be pleased to quash by an order of CERTIORARI, the entire recruitment process for positions in the Embu County Public Service, by the respondent, as set out in the respondent's advertisement of 12th November 2019 published in the Star Newspaper or carried in any other media.

ii) *THAT* this Honourable Court be pleased to PROHIBIT the respondent from advertising and/or recruiting persons to positions in the Embu County Public Service before such positions are established as provided by law and have a budgetary allocation in the approved county budget.

iii) *THAT* the costs of the impugned advertisement of 12th November 2019 published in the Star Newspaper, be borne by the respondent's members personally, jointly and severally.

The Respondent in a Replying Affidavit sworn on 5th August, 2020 opposes the petition for want of merit and prays that the same be dismissed with costs to herself.

It is the Respondent's case that it is empowered through Article 235 (1) (a) of the Constitution of Kenya, 2010 to establish and abolish offices in the public service in the following terms;

"Article 235 (1) A county government is responsible, within a framework of uniform norms and standards prescribed by an Act of Parliament, for-

- a) establishing and abolishing offices in its public service;*
- b) appointing persons to hold or act in those offices, and confirming appointments;..."*

This is underpinned vide Section 59 of the County Government Act, 2012 as follows;

"Functions and powers of a County Public Service Board

Section 59(1) The functions of the County Public Service Board shall be, on behalf of the county government, to-

- (a) establish and abolish offices in the county public service..."*

Again, the Respondent comes out as follows;

5.THAT the bulk of the positions advertised (sic) for recruitment through the newspaper on 12th November, 2019 were already duly established and approved by the Public Service Commission (PSC) which is constitutionally and statutorily empowered to establish positions and offices in public service and contained in a Scheme of Service duly approved by the PSC and sample schemes of service specified hereunder namely:

- a) 64 registered nurse, Job Group H,*
- b) 12 medical laboratory technicians, Job Group G,*
- c) 5 Senior Registered Clinical Officer (Anaesthetist), Job Group H,*
- d) 27 Senior Registered Nurse, Anaesthetist, Theatre, ICU/HDU. Accident & Emergency, all Job Group L,*
- e) 7 Medical officers, Job Group M,*
- f) 6 Mortuary attendants, Job Group D,*
- g) 3 Registered Clinical officer, Job Group H,*
- h) 1 Tailor, Job Group D,*
- i) 9 positions comprises of Chief Executive Officer Embu Level 5 Hospital, Director of Public Health, Medical Specialists under Scheme of Service including: Oncologist, psychiatrist, Radiologist, Nephrologist, Anaesthiologist, Pathologist and Pharmacist,*
- j) Director Legal Affairs, Director Internal Audit, Director Disaster Management, Job Group R,*
- k) 2 Senior Support Staff, Job Group D,*
- l) Principal Supply Chain Management Officer, Job Group N,*

Annexed hereto and marked as Exhibit AKM-1 is a copy of extracts of various schemes of service approved by the Public Service

Commission establishing various advertised positions.

The Respondent's further case comes out as follows;

- *That four board members of Embu County and Investment and Development are duly established under the Embu County Investment and Development Corporation Act in 2018 that was legislated by the Petitioner and remuneration determined by the County Treasury as prescribed in the law.*
- *That the County Attorney position has been there since the inception of the County Government and now even formalized by an Act of Parliament, Office of the County Attorney Act, and quashing the same while the office holder well known to the Petitioner has not been enjoined in the proceedings will violate the rules of natural justice of the right to be heard before being condemned.*
- *That the 6 Talent Academy posts in Embu County Government's project that has been running since 2014 and was duly budgeted for and no order can be issued against the government without being given an opportunity to be heard.*

The Respondent's further aver that these positions existed even before devolution and that most staff were seconded to the County and therefore the schemes of service currently in use were adopted from the National Government after the provision of County Health Service in the devolved function under the Fourth Schedule, Part 2, paragraph 2(a) of the Constitution. The allegation that the positions advertised did not exist is false as the job groups are the same. This would be contrary to Article 234 (2) (a) of the Constitution of Kenya, 2010 and Section 25-29 of the Public Service Commission Act. This is condemnation even without inviting the said Commission to be heard on the matter.

It is her case that the entire process of advertisement, recruitment and placement of persons to these positions was legitimate, lawful and constitutional in that it met the legal and constitutional threshold for so doing.

Last but not least, the Respondent posit that this court lacks jurisdiction to handle the grievance raised herein as the petition offends Section 77 (2) of the County Governments Act, 2012, which empowers the Public Service Commission to entertain appeals on any decision relating to employment of a person in a county government including any decision in respect of, *inter alia*, recruitment, selection, appointment and qualifications attached to any office in the County, as in the case herein. The Claim is therefore prematurely and untenable.

Further, the Respondents avers that the Petitioner has not demonstrated the following;

- Violation of the Constitution through irregular appropriation; salaries for the positions filled have been approved by way of supplementary budget.
- Use of county public funds without approval.
- That the recruitment was done without budgetary allocation.

She therefore prays that the petition be dismissed for lack of merit and costs awarded to herself.

The issues for determination therefore are;

1. Whether this court has jurisdiction to handle the present dispute?
2. Whether the 164 advertised positions are non-existent and whether there was violation of the Constitution on the recruitment process for the 164 positions?
3. Was there irregular appropriation of county fund and what is the position of the law on utilizing money nor budgeted for?
4. What is the effect of non-joinder of various parties who will be affected by Court's determination to this petition?
5. Who bears the costs of this Petition?

The 1st issue for determination is whether this court has jurisdiction to handle the present dispute. The Respondent in their written submissions dated 3rd November 2020 submits that this court lacks jurisdiction to handle the issue(s) in dispute as the petition offends Section 77 (2) of the County Government Act, 2012 which empowers the Public Service Commission to entertain appeals on any decision relating to employment of a person in a county government including any decision in respect of, *inter alia*, recruitment, selection, appointment and qualifications attached to any office in the County, as in the case herein. The claim therefore is prematurely before court.

On this, the Respondent relies on the authority of **Junet Mohamed Ibrahim & another v County Government of Mandera & 3 others (2019) eKLR** where the court cited with approval the case of **James Tinai Murete & others vs County Government of Kajiado & 22 others** where Justice Mumbi Ngugi stated that it was not the intention of the legislature to establish a dispute resolution mechanism and then render the same redundant by giving parties the option to choose whether to follow it or not.

It is her further submission that the jurisdiction donated to this court by Article 162 (2) of the Constitution to exclusively hear employment disputes should not be interpreted in a way that is disruptive of the legal framework established under the County Governments Act, the Public Service Commission Act and the PSC (County Government Public Service Appeal, (procedure Regulations), 2016 and The Embu County Investment and Development Corporation Act, 2018.

Again, the Public Service Commission has a clear constitutional and statutory jurisdiction under Article 234(2) and Section 88 of the Public Service Commission Act, 2017 to hear the matter and give the remedies as sought under Section 88 (5) of the Act.

This is besides the provisions of Section 9(2) of the Fair Administrative Action Act to the extent that the court shall not review an administrative action or decision unless the mechanism including internal mechanism for appeal or review and all remedies available under any other written law are first exhausted.

The Petitioner in her written submissions dated 24th November 2020 denies the assertions by the Respondent that this court lacks jurisdiction for being an affront to section 77 (2) of the County Government Act, 2012. It is her submission that *this court has jurisdiction to hear this dispute as the same touches on issued of legality of the recruitment process and not on the merits or demerits of the process hence the matter is in the right forum as only the court has powers to make pronouncements over the validity of a process undertaken by a constitutional body like the respondent.*

Further, the provisions of Section 77 (2) are *not couched in mandatory terms hence the respondent is wrong to insist that this dispute is in the wrong forum. The section cannot be interpreted to mean that the jurisdiction of the court is ousted by the mere fact that the section has provided for an alternative.*

The issue of jurisdiction in this court remains controversial, ten plus years after the onsets of the Constitution of Kenya, 2010. This is unfortunate. I do not agree with the case and submissions of the Respondent on this subject. This is because of the narrow view of the courts jurisdiction to merely relate to matters that do not fall within the ambit of Section 77 (2) of the County Governments Act, 2012. In this case, the court is called upon to address a situation involving the constitutionality of employment in Embu County by the Respondent. This goes beyond the scope of Section 77 (2) above. The impetus of the subject matter is the determinant of jurisdiction. A reference to the Public Service Commission on this kind of matter would not be opportune as the Commission lacks competency and jurisdiction in such determination this is clearly the province of this court.

This court delved on this subject in the authority of **Mike Sonko Mbuvi v clerk, Nairobi City Council Assembly & 4 others (2020) eKLR** where the court made the following observations;

Thus to answer the preliminary issue the court returns that it has jurisdiction to entertain the present petition. The court adds that whether it is about employment law or policy or about individual public officer's grievances, the jurisdiction of the court would properly be available in that regard.

Third, parties are in agreement that the Court's jurisdiction flows from Article 162(2) (a), Article 165 (5) (b) and the provisions of the Employment and Labour Relations Court Act, 2011. There is no doubt that the dispute is about whether the initiated impeachment proceedings are continuing in accordance with the relevant provisions of the standing orders and the Constitution. The Court has already found that impeachment is in the nature of a disciplinary process that may lead to the petitioner's removal from office as is clearly a human resource function that squarely falls under the jurisdiction of the Court and the Court enjoys the relevant jurisdiction. Section 12(1) of the Employment and Labour Relations Court Act, 2011 is clear that the Court has exclusive original and appellate jurisdiction to hear and determine disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of the Act or any other written Law. Section 12 (2) of the Act (which the parties appear to have failed to refer to) further provides that an application, claim or complaint may be lodged with the court by or against an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any law written law for such purpose- and by that provision, it is clear that in the instant petition the petitioner (as an employee) has by way of the petition lodged a complaint against the respondents. The Court further holds that by reason of section 12(2) of the Act the proceedings are not limited to parties listed in section 12(1) of the Act but the jurisdiction spreads to disputes about employment even by and against persons not being employees or parties to the contract of service. The Court finds that to be the case especially in view of Article 162(2) as read with Article 165 (5) (b) of the Constitution.

Again,

The court is alert that under Article 159(2) (b) justice shall not be delayed and under Article 159(2) (e) the court is guided that in exercise of judicial authority, the purpose and principles of the Constitution shall be protected and promoted. Under Article 159 (1) judicial authority is vested in the judiciary and it is the opinion of the court that issues of legality of actions or omissions is the immediate and proper primary or original province and jurisdiction of the court and is not the penultimate or initially ceded jurisdiction of persons, public bodies and authorities outside the judiciary. In the opinion of the court, it would amount to delayed justice to tell the claimant thus, "The court knows your alleged case is that an illegality has taken place; you challenge the alleged illegality; on merits of the challenged decision you ought to appeal to the Commission; the commission has no jurisdiction to consider issues of illegality as you have alleged in your case but it might consider it and may rule in your favour; and therefore, thought this court has the primary jurisdiction to consider the issue of illegality as you have alleged, you ought to have gone to the Commission in the first instance just to see if the Commission might have considered the issue of illegality before you moved this court and your case is dismissed accordingly for failure to give the Commission chance to exercise the speculative and hopeful jurisdiction on that issue of alleged illegality. While..." Thus, the court finds that as submitted for the petitioner, he needs not wait for his rights and fundamental freedoms to be violated and thereafter move the court but he is entitled to arrest the alleged threatened violation as is purportedly done in the instant petition and application accompanying the petition.

To me, the case for lack of jurisdiction fails for being short of the import of Article 162 (2) (a) and Section 12, Employment and Labour Relations Court Act, 2014 coupled with Article 165 (5) (b) of the Constitution which provides jurisdiction for this court to hear and determine disputes relating to Employment and Labour Relations, like the present case.

The 2nd issue for determination is whether the 164 advertised positions are non-existent and whether there was violation of the Constitution on the recruitment process for the 164 positions. It is the Petitioner's submission that she faults the action to the Respondent on the basis of

Sections 59 and 60 of the County Government Act, 2012. Section 59 (1) (a) provides that no position in the County Public Service can be competently filled before it is advertised whereas Section 60 (1) provides that in creating such position(s), the Respondent must be satisfied that funding for the proposed office has been provided for.

It is her penultimate case that the recruitment process undertaken for purposes of filling the over 150 plus positions in the Respondent is unlawful, irregular and unconstitutional as the respondent had not established the said positions and further that no budgetary provision for the same had been passed in the year 2019-2020.

The Respondent's cardinal defence at Part B of her written submissions is summed up thus;

8. The Respondent filed a Replying Affidavit sworn by the Chairman of the Respondent, Mr. Alfred Kamau Muigai, on 5th August, 2020 that was electronically served on the counsel for the Petitioner on 7th August, 2020 as well as on 29th September, 2020 when the Petitioner feigned lack of first service.

9. The Respondent relies further on various exhibits annexed to the Replying Affidavit aforesaid.

10. The Replying Affidavit raises weighty issues which the court should consider and which the Respondent relies on.

The Respondent's case and submission is that the positions advertised for competitive recruitment are established by the Public Service Commission (PSC) and others through existing statutes referred to elsewhere and the mode of recruitment and removal of office holders is clearly laid down in such statutes and no particulars of breach of statutes that elaborate recruitment procedure is evidenced by the Petitioner.

It is her further case and submission that the bulk of the 133 advertised positions for Health workers on 12th November 2019 were already duly established and approved by the Public Service Commission and these submit to the existing stratum on job groups. The Petitioner's allegations on the subject therefore falter.

The Respondent further submits the justification and legality of the recruitment of four (4) board members of Embu County Investment and Development Corporation, The County Attorney position and six (6) Talent Academy posts.

Further, the Respondent's submit that Section 59A of the County Governments Act gives the Respondent independence in the discharge of its functions by providing that it shall not be subject to direction or control of any other person or authority in the following terms;

"In performance of its functions under the Act, the County Public Service Board shall be independent and shall not be subject to the direction or control of any other person or authority..."

35. Article 235(1)(a) of the Constitution of Kenya empowers County Government within a framework of uniform norms and standards prescribed by an act of parliament to establish and abolish offices in its public service in the following terms;

At the risk of repetition, let me resound the Respondents case as follows;

"Article 235 (1) A county government is responsible, within a framework of uniform norms and standards prescribed by an Act of Parliament, for-

c) establishing and abolishing offices in its public service;

d) appointing persons to hold or act in those offices, and confirming appointments;..."

In the penultimate, the Respondents submits as follows;

41. It is the Respondent's Submissions that in conducting the recruitment exercise of various staff to the Embu County Government, the Respondent adhered to the Constitution, County Government Act, Public Finance Management Act and other relevant laws and it has not violated any law as alleged by the Petitioner. No breach has been pointed out by the Petitioner with a razor sharp precision.

The Respondent's case is that the Petitioner has failed to adduce credible or any evidence in support of the illegality and unconstitutionality of the advertisement and recruitments of the 150 plus members of staff in the County. It is her further case that the Petitioner has not particularised or evidenced the breaches of the Constitution now complained of. I cannot agree more.

The Respondent's case on this subject and issue remains uncontroverted. Her position therefore carries the day.

The 3rd issue for determination was there irregular appropriation of county fund and what is the position of the law on utilizing money nor budgeted for. This is the mainstay of the Petitioners case and submissions.

In rebuttal, the Respondent submits that the petitioner has not tabled any evidence of violation of the Constitution through irregular appropriation and salaries for the position filled by herself. She submits as follows;

43. The complaint of use of county public funds for purpose not budgeted for has not been substantiated by evidence of how much

funds were used and when.

44. *Evidence has been tendered by the Respondent that salaries for positions advertised have been approved by way of supplementary budget. See Exhibit AKM-8 and thus the allegation that funds were utilized without approval of the Petitioner as a purported ground of violation of Constitution falls flat on its face.*

45. *The Petitioner approved a Supplementary Budget that comprises salaries for the staff recruited and if the Petitioner had any objection, it should not have passed approved the Supplementary Budget Estimates for the financial year 2019/2020 and is thus estopped under section 120 of the Evidence Act from claiming that funds were not budgeted. Exhibit AKM-8, being a copy of the approved supplementary budget has been tabled.*

46. *Even if there was no allocation for the position, Section 135 (1) of the Public Finance Management Act allows County Government to spend money that has not been appropriated and to submit to county assembly supplementary budget in certain circumstances, inter alia, in support of the additional expenditure.*

47. *The Petitioner's allegation of fear of withdrawal of Revenue Fund for Embu County Government is far-fetched and baseless. A direct answer to this is that any such withdrawal requires the Controller of Budget to approve under Article 207(3) of the Constitution.*

These allegations remain unsubstantiated in evidence and are therefore hollow. They cannot be relied on to foment or even establish a case for the Petitioner.

In the penultimate, the Respondent submits thus;

58. *It is thus clear that the Petitioner has not laid down with precision the manner in which Constitution has been violated and the specific provisions of the Constitution violated by the Respondent with precise facts to warrant Court's intervention.*

59. *The Petitioner challenges 133 health positions created by the PSC under Scheme of Service and seek the same to be quashed while it has not enjoined PSC who is constitutionally mandated to establish them which will amount to violation of rules of natural justice.*

60. *Various positions complained are creatures of statutes and procedure for removal of office holders and it was incumbent upon the Petitioner to exhaust such mechanisms.*

61. *Quashing the recruitment before exhaustion of statutory remedies available to the petitioner will cause disruption of an existing legal framework by the court.*

62. *The petitioner has merely made a blanket accusation and is seeking a blanket order to quash the entire recruitment exercise without having stated and particularized with precision the manner in which the Constitution has been violated and the Petition is thus baseless.*

63. *The Petition dated lacks merit and should be dismissed with costs to the Respondent since costs follows an event.*

This is not gainsaid.

The 4th issue for determination what is the effect of non-joinder of various parties who will be affected by Court's determination to this petition. This matter forms a substantial portion of the Respondent's case. It is her case that most of the candidates employed in respect of the recruitment exercise had been employed in the Permanent and pensionable basis and quashing the process would open a flood gate of litigation against the County Government with consequential huge losses and potential waste of tax payers money. This would also hurt development, yet the Embu County Government has not been enjoined as the party to these proceedings.

Further, the Respondent submits that the petition is also incompetent and fatally defective for non joinder of the Public Service Commission which created the 141 health positions now complained of. This is besides the 4 Board members of the Embu County Investment and Development Corporation who have also not been so enjoined. This is fatal to the petition's substratum and efficacy and it therefore fails *in toto*.

This is fortified by the authority of **Bellevue Development Company Limited v Vinayak Builders Limited & another (2014) eKLR**, relied on by the Respondent in which the court held as follows;

"...It is trite law that orders cannot be enforced against a person not party to a suit. This principle emphasizes the doctrine of natural justice that one cannot be condemned unheard."

Joinder of parties is necessary and mandatory so as to enable a wholesome determination of the issues in disputes. It involves all parties relating to the disputes for ease of determination and application of the various interest of the parties. Non-joinder may in some instances not be fatal to litigation but like in the present case can cause havoc if the determination of court affects outsiders not involved in the litigation. In this scenario, non-joinder becomes a death blow to the petition. And this answers the 4th issue for determination.

The last issue for determination is who shall bear the costs of this Petition. In as much as the courts appreciate the magnanimity of this cause,

it must be allowed to sense sibling rivalry in the circumstances. I therefore do not raise issue for costs but instead order that each party bears the costs of the petition. And this clears all the issues for determination.

I am therefore inclined to dismiss the petition with orders that each party bears their costs of the same.

Dated and delivered at Nyeri this 25th day of February 2021.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr.Muguni holding brief for Njenga instructed by Muchoki Kang'ata, Njenga and Company Advocates the Petitioner.
2. Mr.Robinson Kigen instructed by Wesonga, Mutembei and Kigen Advocates for the Respondent