



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION NO. E003 OF 2020

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
2, 3, 10, 19, 20, 23, 27, 28, 48, 55, 56 AND 258 OF THE CONSTITUTION**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF
SECTION 31 OF THE OFFICE OF THE COUNTY ATTORNEY ACT**

BETWEEN

EVANS MUSWAHILI LADTEMA.....PETITIONER

v

GOVERNOR, COUNTY OF VIHIGA.....RESPONDENT

AND

COUNTY ASSEMBLY OF VIHIGA.....1st INTERESTED PARTY

COUNCIL OF GOVERNORS.....2nd INTERESTED PARTY

AGGREY B.L. MUSIEGA.....3rd INTERESTED PARTY

JUDGMENT

1. Evans Muswahili Ladtema (the Petitioner) instituted these proceedings against the Governor, County of Vihiga (the Governor) on 13 October 2020, alleging that the nomination of Aggrey B.L. Musiega (3rd Interested Party) as the County Attorney, Vihiga was invalid and unconstitutional for violating the transitional provisions of section 31(2) of the Office of the County Attorney Act, 2020.
2. The Petitioner also joined the Council of Governors and the County Assembly of Vihiga as Interested Parties.
3. Filed together with the Petition was a Motion under a certificate of urgency seeking interim conservatory orders.
4. The Court declined to certify the Motion as urgent but directed that it be served and the parties file and exchange affidavits and submissions ahead of an *inter-partes* hearing on 11 November 2020.
5. The 3rd Interested Party filed a Notice of Preliminary Objection on 3 November 2020 contending that:

(i) The Petitioner Evans Muswahili Ladtema lacks the requisite locus standi in this matter to sustain the motion and the Petition having chosen to advance the interests of an individual, namely Stella Orengo, in a public interest proceeding.

(ii) The Petition is not seeking interpretation of section 31 of the Office of the County Attorney Act by the Honourable Court but instead seeking to enforce personal pursuits and interpretation of the law.

(iii) The Petitioner is acting in abuse of the process of this Honourable Court by misleading the Court to believe he is for gender equity in the County Executive Committee of Vihiga County yet separately, equally fighting the nomination of a woman, namely Mary Amalemba, to the same committee in a similar Petition before this Honourable Court being No. 31 of 2020.

(iv) This Honourable Court lacks jurisdiction to entertain the Petition and/or grant the reliefs sought.

(v) This Petition is *res judicata* in light of Constitution Petition E053 of 2020 before Nairobi ELRC and Petition No. 36 of 2020 ELRC Kisumu.

(vi) The reliefs sought by the Petitioner in the Petition are unconstitutional.

6. The County Secretary, Vihiga, filed an affidavit in reply to the Motion and Petition on 6 November 2020.

7. When the parties appeared in Court on 11 November 2020, the Petitioner indicated that the Motion had been overtaken by events as the 3rd Interested Party had already been sworn into office. The Motion was therefore marked as abandoned.

8. The Court was also informed that a Ruling was pending before the High Court in Kakamega in a related Petition (Kakamega High Court Petition No. 9 of 2020).

9. The Court consequently directed that it would give directions on 23 November 2020 after the High Court had given its Ruling.

10. On 12 November 2020, one Sammy Sandagi Mugita applied to be joined as a 4th Interested Party and the Court directed him to serve the Motion.

11. When the motion came up on 23 November 2020, the applicant was absent, and it also turned out he had not served the application on all the parties. The Court dismissed the application.

12. At the same time, the Court granted the Petitioner leave to file an Amended Petition and also directed that the Preliminary Objection on record and the Amended Petition would be taken together.

13. The Court directed the parties to file and exchange affidavits and submissions ahead of judgment today.

14. The Petitioner sought the following reliefs in the Amended Petition:

(i) A declaration that the nomination of Aggrey Musiega to the position of County Attorney Vihiga County is illegal and unconstitutional.

(ii) An order of certiorari to be issued quashing the nomination, appointment and/or purported appointment of one Aggrey B. L. Musiega to the office of County Attorney Vihiga County.

(iii) A declaration that the Respondent violated the Constitution by nominating and purporting to appoint the 3rd Interested Party to the office of County Attorney Vihiga County.

(iv) A declaration be issued that persons performing functions of County Attorney as at 13th July 2020 be deemed as the County Attorney, County Solicitor and Legal Counsel under the office of the County Attorney Act by operation of law.

(v) A permanent injunction restraining the Respondent and the 3rd Interested Party from appointing the 3rd Interested Party to any appointive positions since he is beyond the age of retirement.

(vi) Any other relief that this Court may deem fit and just to grant to the Petitioner.

15. The following were filed:

(i) Amended Petition on 4 December 2020.

(ii) Affidavit in Response to Petition by 3rd Interested Party on 17 December 2020.

(iii) Replying Affidavit by County Secretary on 17 December 2020.

(iv) Replying Affidavit by Clerk of the County Assembly on 17 December 2020.

(v) Further verification in support of the Petition on 21 December 2020.

(vi) Further Affidavit by the Petitioner on 29 December 2020.

(vii) The Governor's submissions on 15 January 2021.

(viii) Submissions by the Petitioner on 25 January 2021.

(ix) Submissions by the County Assembly on 4 February 2021.

16. The Court has considered the Amended Petition, the affidavits, the Preliminary Objection and the submissions.

17. None of the parties identified with precision the Issues they wanted the Court to examine and determine.

The Objections

18. The grounds set out in the Notice of Preliminary objection were fact anchored and therefore did not meet the test of true preliminary objection.

Locus standi

19. The Respondents objected to the Petition on the ground that the Petitioner was projecting the interests of a person who was interested in the position of the County Attorney, and therefore his locus standi was legally doubtful.

20. The position of the County Attorney is a public office.

21. It is expressly established by statute. The national values and principles require that the public participates in the appointment process. The appointment process should also pass the test of merit and competitiveness.

22. With the enlarged locus standi under Article 22 of the Constitution, the Court holds that the Petitioner had the requisite *locus standi* to commence the proceedings.

Res judicata

23. The 3rd Interested Party urged that the Petition was *res judicata* because of Nairobi Petition No. E053 of 2020, *Law Society of Kenya v Governor, County Government of Vihiga & Ors* (it was transferred to Kisumu and registered as Kisumu Petition No. 36 of 2020).

24. The aforesaid Petition was not heard on the merits but was struck out on 8 October 2020 because the Petitioner did not attend the hearing.

25. In the circumstances, *res judicata* does not arise.

Abuse of court process

26. The Respondents also objected to the Petition on the ground that it was an abuse of the court process and *sub judice* because of Kakamega High Court Petition No. 9 of 2020, *Felix Sayia v Governor, County of Vihiga*, where the nomination and appointment of the 3rd Interested Party were also under challenge. The High Court had issued a stay order therein on 12 October 2020.

27. The 3rd Interested Party asserted in paragraph 15 and 16 of his replying affidavit in Answer to the Amended Petition filed in Court on 17 December 2020 that the Petitioner herein was aware of the pending Petition before the High Court Kakamega and that he was acting in collusion with the Petitioner therein and, therefore, this Petition was an abuse of the court process.

28. In the further affidavit filed in Court on 29 December 2020, the Petitioner acknowledged the existence of Kakamega High Court Petition No. 9 of 2020, *Felix Sayia v County Government of Vihiga & Ors* and deposed that he was aware of a Ruling delivered therein and that he had exhibited a copy of the Ruling (the same was not exhibited).

29. The Court was told that the High Court in Kakamega had granted an order stopping the appointment of the 3rd Interested Party as the County Attorney on 22 September 2020. The status of the suit as of 23 November 2020 was not disclosed.

30. There is more than sufficient evidence before the Court that persons with interest in the governance of the County of Vihiga have filed multiple suits before different Courts on the singular issue of the nomination and appointment of Aggrey B. L. Musiega as County Attorney, County of Vihiga.

31. It appears to this Court that these multiple suits were well coordinated by forces who did not wish to reveal themselves.

32. Such multiple suits have the potential of causing massive embarrassment to the judiciary, and the common Respondents to such type of suits should be able to move with speed for appropriate orders instead of filing Preliminary Objections without sufficient factual material in terms of pleadings.

33. This issue is not decisive in this Petition.

Qualifications for the office of the County Attorney

34. The Petitioner sought a declaration that the 3rd Interested Party did not possess the qualifications to serve as a County Attorney.

35. The office of the County Attorney is established by section 4 of the office of the County Attorney Act, 2020.

36. Section 5(2) thereof sets one of the primary qualifications for appointment to the office as an advocate of the high court for at least 5 years and advocates who meet the requirements of chapter 6 of the Constitution.

37. The Petitioner did not present any evidence before the Court showing that the 3rd Interested Party had not served as an advocate of the High Court for more than 5 years or that he did not meet the threshold set by chapter 6 of the Constitution.

The validity of the appointment of 3rd Interested Party as County Attorney

38. The Office of the County Attorney Act, 2020 was assented to on 9 July 2020, and the commencement date was prescribed as 27 July 2020. Section 4 of the Act establishes the office of the County Attorney, and section 5 provides for the qualifications for the office.

39. In challenging the nomination and/or appointment of the 3rd Interested Party to the office of the County Attorney, the Petitioner launched a two-pronged attack broadly.

40. The first prong of attack was that the Director of Legal Affairs with the County Government was qualified and should have transitioned to the office of County Attorney but was bypassed, and secondly, that the nomination of the 3rd Interested Party did not meet the threshold of public participation, merit, competitiveness and transparency.

41. In bypassing the said Director of Legal Affairs and nominating the 3rd Interested Party, the Petitioner contended, the Governor violated the transitional provisions of section 31 of the Act.

42. The Governor did not agree with the Petitioner's assertions.

43. In the affidavit of the County Secretary, it was deposed that the 3rd Interested Party applied for the office of County Attorney and upon consideration of his qualifications which included being a person living with a disability and having served as a Legal Advisor and County Attorney during the term of the first Governor, he was found suitable and was nominated.

44. It was further deposed that after the nomination, the 3rd Interested Party's name and the nomination were publicised, and petitions were received by the County Assembly, which approved the nomination.

45. The County Assembly, on its part, stated that it received from the Governor a notice of nomination of the 3rd Interested Party dated 9 September 2020, after which it issued a public notice inviting members of the public to give views, but the process was temporarily stopped by the Court and that when court orders stopping the approval process were vacated, the Committee on Appointments vetted the 3rd Interested Party and the Assembly subsequently approved the nomination.

46. The 3rd Interested Party acknowledged that there was a person holding the office of the Director of Legal Affairs on a 3-year contract but asserted that she had not been performing the functions equivalent to those of a County Attorney.

47. This Interested Party also stated that he was qualified and applied for the position of County Attorney on the grounds including that of disability but was not aware of any other applicants

48. Section 31 of the Act provided for transition in the following terms

Transition

31 (1) Upon the coming into effect of this Act, members of staff employed by the county executive to perform the functions of the Office under this Act shall—

- (a) be deemed to be members of staff of the Office in their respective capacities;
- (b) retain any rights accrued or accruing to them as such staff or contributors;
- (c) be at liberty to continue to contribute to any superannuation scheme to which they were contributors;

(d) be entitled to receive any deferred or extended leave as if they have continued to be such staff of the Office during their service with the county executive;

(e) be entitled to receive any payment, pension or gratuity as if they have continued to be such staff of the Office during their service with the county executive; and

(f) be deemed to be employees of the Office for the purposes of any law under which those rights accrued or were accruing, under which they continue to contribute or by which that entitlement is conferred.

(2) Despite the provisions of subsection (1), a person employed by the county public service board to perform the functions of the County Attorney, County Solicitor or County Legal Counsel at the commencement of this Act shall continue to hold their respective positions in the Office after the coming into effect of this Act only if they meet the qualifications specified in this Act.

(3) The county public service board shall, where a person employed by the county executive to perform the functions of the County Attorney, County Solicitor or County Legal Counsel does not meet the qualifications specified in this Act, redeploy such person to the highest position that is vacant and to which such person qualifies for the appointment.

49. According to the Petitioner, at the commencement of the Act, the person who was occupying the position of Director of Legal Affairs, Stella Orenge, should have been transitioned into the office of the County Attorney. The said person, the Petitioner asserted, met the qualifications to serve in the office of County Attorney.

50. In the view of the Court, the import of section 31(2) of the Office of the County Attorney Act, 2020 is that the persons holding the named offices of County Attorney, County Solicitor and County Legal Counsel were to continue holding those offices and performing the functions of the respective offices if they met the set qualifications.

51. As to the person who was holding the position of Director of Legal Affairs and other staff, the transitional clause applicable was/is section 31(1) of the Act. The Director of Legal Affairs was thus transitioned into the same office and not that of the County Attorney.

52. The Court, therefore, does not find that the person holding the office of Director of Legal Affairs was unlawfully bypassed.

53. On the second prong, the office of the County Attorney is one that requires the approval of the County Assembly.

54. Consequently, under section 5(1) of the Public Appointments (County Assemblies Approval) Act, 2017, the Governor was under a statutory duty to publish an advertisement inviting applications for nomination to the office of the County Attorney.

55. The advertisement contemplated by section 5(1) of the Public Appointments (County Assemblies) Act, 2017 has its antecedents in the supreme law which requires appointments to be made on merit and competitiveness with attendant public participation.

56. The 3rd Interested Party did not disclose which advertisement prompted him to apply for the office of the County Attorney. The Governor also did not disclose when an advertisement was made.

57. The nomination of the 3rd Interested Party did not, therefore, meet the statutory threshold of competitiveness and merit. The fact that the 3rd Interested Party is a person living with a disability would not excuse the unilateral and arbitrary decision by the Governor.

58. The nomination and appointment were invalid.

Conclusion and Orders

59. From the foregoing, the Court finds and orders that:

(i) A declaration be and is hereby issued that the nomination and appointment of Aggrey B. L. Musiega to the position of County Attorney Vihiga County is illegal and invalid.

(ii) An order of certiorari be and is hereby issued quashing the nomination, appointment and/or purported appointment of one Aggrey B. L. Musiega to the office of County Attorney Vihiga County.

60. The Petition was in the public interest. Each party to bear their own costs.

61. The Deputy Registrar is directed to transmit a copy of this Judgment to the High Court, Kakamega, where a related Petition being Kakamega High Court Petition No. 9 of 2020, *Felix Sayia v Governor, County of Vihiga* is pending.

Delivered through Microsoft teams, dated and signed in Kisumu on this 24th day of February 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Petitioner D. O. E. Anyul & Co. Advocates

For Respondent County Attorney

For 1st Interested Party Francis Rakewa, Principal Legal Counsel

For 3rd Interested Party In person

Court Assistant Chrispo Aura