



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

PETITION NO E001 OF 2020

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 22, 23, 27, 41, 47, 48, 50, 55, 73, 75, 159, 162, 232, 235 AND 258 OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 10, 27 AND 232 OF THE CONSTITUTION OF KENYA,
2010; SECTION 5 OF THE EMPLOYMENT ACT, 2007; SECTION 107(2C) OF THE PUBLIC FINANCE MANAGEMENT ACT,
2012; SECTION 36 OF THE PUBLIC SERVICE COMMISSION ACT, 2017 AND SECTION 52(2) OF THE COUNTY
GOVERNMENTS ACT, 2012**

AND

**IN THE MATTER OF THE ALLEGED UNLAWFUL ADVERTISEMENT OF THE POSITIONS OF VILLAGE
ADMINISTRATORS**

BETWEEN

JOHN WEKESA KHAOYA.....PETITIONER

v

CHAIRMAN, COUNTY PUBLIC

SERVICE BOARD OF BUNGOMA.....1st RESPONDENT

GOVERNOR, COUNTY

GOVERNMENT OF BUNGOMA.....2nd RESPONDENT

COUNTY PUBLIC SERVICE

BOARD OF BUNGOMA.....3rd RESPONDENT

COUNTY GOVERNMENT, BUNGOMA.....4th RESPONDENT

AND

COUNTY ASSEMBLY OF BUNGOMA.....INTERESTED PARTY

JUDGMENT

1. Joseph Wekesa Khaoya (the Petitioner) lodged a Petition with the Court on 6 November 2020 alleging that an advertisement for the recruitment of village administrators carried in the Standard Newspaper on 2 November 2020 by the County Public Service Board (the Board) was unlawful because there was no budget for the recruitment, no scheme of service, being a waste of public resources and because village units/boundaries had not been delineated or gazetted.

2. The Petitioner also alleged that the advertisement was discriminatory on age grounds.

3. The Petitioner sought the following reliefs:

- (i) A declaration that the advert made by the 3rd Respondent on 2nd November 2020 in the Standard Newspaper is null and void.
- (ii) The 1st and 3rd Respondents to compensate the applicants for general damages caused to the applicants who made their applications for the 2nd November 2020 advert and 13th July 2018 advert for the position of Village Administrators.
- (iii) Costs of this Petition be in the cause.

4. The Court directed that both the Motion and Petition be served upon the Respondents and Interested Party, and the Court gave further directions on 16 November 2020, 30 November 2020 and 14 December 2020.

5. The County Attorney, County of Bungoma, filed a replying affidavit on 30 November 2020, and a further replying affidavit and an affidavit in reply to the Petition on 11 December 2020.

6. Despite the Court directing the parties to file and exchange submissions, none of the parties' submissions was on file by the agreed timelines.

7. The Court has considered the material on record.

Failure to prosecute the Petition/comply with court orders

8. The Court gave initial directions on 11 November 2020, and when the file came up for further directions on 16 November 2020. The Petitioner did not attend Court on this latter date.

9. The Court gave more directions and directed that the Petition be mentioned on 30 November 2020. On this day, the Petitioner was again absent.

10. When the file was next placed before the Court on 14 December 2020, Ms Nyikuru for the 2nd and 4th Respondents informed the Court that she had met the Petitioner and alerted him about the day's session.

11. The Petitioner did not attend the session.

12. On the same day, the Court directed the parties to file and exchange submissions. The order was not complied with.

13. The Petitioner approached the Court under a certificate of urgency on 11 November 2020. He did not attend any of the Court sessions held on 16 November 2020, 30 November 2020 and 14 December 2020. He failed to file submissions.

14. The conduct of the Petitioner exhibits a lack of interest in prosecuting the Petition. Petitions are ordinarily heard through the pleadings and submissions.

15. The net effect of the conduct of the Petitioner is that he has failed to prosecute the Petition. On that ground alone, the Court finds that the Petition is for dismissal.

Res judicata/abuse of the court process

16. The Respondents asserted in the Affidavit in Answer to the Petition that issues raised by the Petitioner herein had been the subject of determination by the High Court in Bungoma in Bungoma High Court Petition No. 9 of 2018, *Iddi Oniallah Muyonga & Ors v Elizabeth Wanyonyi & Ors*.

17. The remedies sought in the Petition before the High Court were:

- (i) THAT this Honourable Court finds that the process of delineating village units and advertisements of recruitment, employment and deployment of village administrators by the Respondents was unconstitutional, illegal, irregular and exclusive to the disadvantage of the Petitioners and other residents of Malakisi Division.
- (ii) THAT this Honourable Court finds that the entire process of delimitation of village units, advertisement, shortlisting, recruitment and deployment of village administrators was unconstitutional, illegal, irregular, unfair and discriminative against the residents of Malakisi Division and therefore null and void.
- (iii) THAT the Respondents be compelled to pay the costs of the application, the Petition and compensates the residents of Malakisi Division for the injustice meted against them.

18. The High Court found no merit in the challenges to the delimitation of village units for Malakisi Division and the recruitment process.

19. This Court finds that Petition herein is caught up by the doctrine of issue estoppel, a species of *res judicata*.

20. This Court was being asked to adjudicate on Issues that had been presented before the High Court. It cannot be that the Petitioner was not aware of the proceedings before the High Court.

21. The Court must observe that it has noticed a practice where the same dispute is lodged in different Courts within this region.

22. It is a practice with the potential to cause huge embarrassment to the institution of the judiciary.

Merits of the Petition

23. The Respondents produced through the affidavits copies of the Bungoma County (Decentralised Units) Administration Act, 2015, which was gazetted on 27 September 2018 and budget for the Department of Public Service Management for 2020/2021, which included emoluments for the village administrators.

24. The question of delineation of boundaries and/or budget is therefore misplaced.

25. On the question of a scheme of service, it is the view of the Court that the lack of such a scheme cannot invalidate an advertisement or recruitment process as it would be speculative.

Conclusion and Orders

26. For the above reasons, the Court orders the Petition be dismissed with costs to the 2nd and 4th Respondents.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 31ST DAY OF MARCH 2021.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioner in person

For 1st & 3rd Respondents did not formally come on record

For 2nd and 4th Respondents Annet Mumalasi & Co. Advocates

For Interested Party did not participate

Court Assistant Chrispo Aura