



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. E007 OF 2020

**IN THE MATTER OF ARTICLES 22(1) & (2)(c), 23(1), 258(2)(c) AND 259(1)(a), (b) & (c) OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 2(1), 3(1), 10, 41(1), 73,
232(1)(e), (g) & (i), 235(1)(a) & (b) OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF URBAN AREAS AND CITIES ACT, 2012

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, 2012

AND

**IN THE MATTER OF THE HUMAN RESOURCE POLICIES AND PROCEDURES MANUAL
FOR THE PUBLIC SERVICE, MAY 2016**

BETWEEN

BENARD OMONDI OUKOPETITIONER

v

KISUMU COUNTY PUBLIC SERVICE

BOARD.....1st RESPONDENT

COUNTY GOVERNMENT OF KISUMU..... 2nd RESPONDENT

MICHAEL ABALA WANGA..... 3rd RESPONDENT

ETHICS AND ANTI-CORRUPTION

COMMISSIONINTERESTED PARTY

RULING

1. Benard Omondi Ouko (the Petitioner) commenced legal action against the County Public Service Board, Kisumu (the Board), the County Government of Kisumu (County Government) and Michael Abala Wanga (the Respondents) on 17 November 2020, alleging that the recruitment process for the position of City Manager by the Board was illegal, unconstitutional, and null and void.

2. The Petitioner also challenged the appointment of Michael Abala Wanga as acting City Manager on the ground he did not meet the test required of public office.
3. The Petitioner sought the following orders:
 - (i) A declaration that the impugned advert calling for applications from competent and qualified persons to fill the vacancy in the office of City Manager, the City of Kisumu and contained in the 1st Respondent's advert carried in the Standard newspaper dated 25 September 2020 at page 26 and posted on the 2nd Respondent's website was calculated at locking out potential applicants hence it is illegal, unconstitutional, null and void.
 - (ii) A declaration that the 3rd Respondent is not qualified to be appointed as a public officer and/or in the public service and that his appointment (sic) and an order of certiorari do issue directed at the 1st Respondent to remove into the High Court of Kenya and quash the 1st Respondent's decision contained in its letter dated 25 September 2020 appointing the 3rd Respondent as acting City Manager for the City of Kisumu.
 - (iii) An order of certiorari do issue directed at the 1st Respondent to remove into the High Court of Kenya and quash the 1st Respondent's advert carried in the Standard newspaper dated 25 September 2020 at page 26 and posted on the 2nd Respondent's website and any other consequent processes and/or decisions including shortlisting of candidates for interviews, interviewing candidates and final appointment of a City Manager-Kisumu City.
 - (iv) Costs of this Petition be borne by the 1st Respondent.
4. At the same time, the Petitioner filed a Motion under a certificate of urgency, seeking various interim reliefs. The Court declined to give any *ex-parte* orders and directed that the Motion be served.
5. When the parties appeared for directions on 19 November, 2020, the Court was informed that the recruitment process had been postponed indefinitely. In the circumstances, the Court declined to issue injunctive relief.
6. The Court directed the Respondents to file and serve responses to both the Motion and Petition before the giving of further directions on 11 December 2020.
7. The Board filed a replying affidavit sworn by its Chief Executive Officer on 10 December 2020, while Mr Michael Abala Wanga filed his replying affidavit on 11 December 2020.
8. On 10 December 2020, one Michael Otieno Nyaguti filed a Motion seeking leave to be joined as an Interested Party and further to be allowed to file and serve submissions or any relevant information.
9. The said Mr Nyaguti contended in support of the Motion that he was a resident of the County; was a public-spirited individual at the centre of clamour for enforcement of values and principles of the Constitution representing the silent majority of residents of the County and that he had an existing interest in infrastructural development of the County.
10. The following day, 11 December 2020, one Mr Douglas Okoth Opala also filed a Motion seeking an order to be joined into the proceedings as a 2nd Interested Party.
11. When the parties appeared before the Court on the same day, the Court directed the Petitioner, the Respondents and the Interested Party to file and serve responses/submissions to the joinder applications ahead of Ruling today.
12. The primary grounds advanced in support of the applications were that the proposed Interested Parties were residents of the County (and Chair of Lower Kibuye Market traders) and that the decisions made by the City Manager affected the traders on a daily basis and therefore, the decision of the Court on the appointment of the City Manager would impact the governance of the County. It was also contended that the applicants had an existing interest in the development and governance of the County and that the Petition raised issues of public importance.
13. The Board and the County Government filed on 30 December 2020 a joint replying affidavit sworn by the Chief Executive of the Board.
14. Mr Nyaguti filed his submissions on 18 January 2021, Mr Opala filed his submissions on 20 January 2021, while the Board and the County Government filed joint submissions on 28 January 2021.
15. The Court has considered the joinder applications, the affidavits and submissions.
16. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 has defined an *Interested Party* as means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.
17. Taking up on the role of an Interested Party, the Supreme Court in *Francis Kariuki Muruatetu & Ar v Republic & 5 Ors* (2016) eKLR explained that an Interested Party should have a direct stake or interest in the litigation and also demonstrate that the decision of the Court would affect them.

18. The dispute which was presented by the Petitioner in the instant Petition was whether the recruitment process of the City Manager was lawful and whether Mr Wanga met the threshold to hold the office. It is not a dispute whose determination is likely to have a polycentric effect.

19. However, it cannot be disputed that decisions implemented and/or made by the City Manager would affect all the residents of the County. Those decisions and/or the implementation of the decisions would affect all the residents, notwithstanding the person holding the office.

20. The Court cannot, therefore, find any direct or identifiable stake or interest demonstrated in the disputation by Mr Opala and Mr Nyaguti beyond or above other residents of the County. Whichever way the dispute is determined, Mr Opala and Mr Nyaguti did not demonstrate any adverse effect the recruitment of Mr Wanga would have on them.

21. The joinder Motions are dismissed with costs to the Petitioner and Respondents.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 24TH DAY OF MARCH 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Petitioner	Mr Muhuyu instructed by Litoro & Omwebu Advocates
For 1 st and 2 nd Respondents	Ms Awuor Otieno instructed by the County Attorney
For 3 rd Respondent	Mr Mongeri instructed by Mongeri Kinyanjui & Co. Advocates
For Interested Party	did not participate
For Mr Opala	PROW & Co. Advocates
For Mr Nyaguti	in person