



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 25 of 2019

IN THE MATTER OF ARTICLES 22(1) & (2)(c), 50(1) AND 258(1) & (2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION AND VIOLATION OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE ENSHRINED IN ARTICLES 1(1), 2(1),(2) & (3), 3(1), 4(2), 10(2), 42, 43, 46, 73, 74, 75, 77, 203, 209, 226, 232(1)(d), (e) & (f) AND 259(1) OF THE CONSTITUTION

AND

IN THE MATTER OF THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27, 28, 43, 46 & 47 OF THE CONSTITUTION

AND

IN THE MATTER OF THE LEADERSHIP AND INTEGRITY ACT, PUBLIC OFFICERS ETHICS ACT, 2003 AND FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE ALLEGED VIOLATION OF SECTIONS 3, 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

IN THE MATTER OF THE OBLIGATION OF PUBLIC SERVANTS TO EARN MORE THAN ONE SALARY AND DOUBLE TAXED REALISE RIGHTS AND FUNDAMENTAL FREEDOMS AND THE NEED FOR A TRANSPARENT USE OF PUBLIC RESOURCES

AND

IN THE MATTER OF PUBLIC SERVANTS ENGAGING IN GAINFUL EMPLOYMENT

BETWEEN

MICHAEL KOJO OTIENO.....1st PETITIONER

EVANCE OTIENO..... 2nd PETITIONER

DIRECTOR GENERAL, KENYA NATIONAL BUREAU OF STATISTICS.....1st RESPONDENT
KENYA NATIONAL BUREAU OF STATISTICS2nd RESPONDENT
CABINET SECRETARY, NATIONAL TREASURY & PLANNING..... 3rd RESPONDENT
HON ATTORNEY GENERAL..... 4th RESPONDENT

JUDGMENT

1. Through this Petition, the Petitioners asserted that it was unlawful to pay remuneration to public officers who were offered temporary employment during the 2019 census as they were already receiving remuneration from public funds.
2. The Petitioners alleged that the payments were unconstitutional and violated the rule of law.
3. The remedies sought in the Petition were
 - (i) A declaration that the Respondents action of allowing public servants to be paid and double-taxed is against the law and therefore null and void *ab initio*.
 - (ii) A declaration that it is unconstitutional for the Respondents to commit Kenyans in an activity that is illegal.
 - (iii) A declaration that it is unconstitutional for the Respondents to fail to uphold, protect and defend the Constitution of Kenya in Article 3(1).
 - (iv) An order quashing the Respondents from paying any public servants who were not seconded in this exercise.
 - (v) An order that KNBS DIRECTOR GENERAL is unfit to hold public office having defeated the purposes and spirit of the Kenyan Constitution in the above-cited (CONSTITUTIONAL AND STATUTORY PROVISIONS) in paragraph D of the Petition.
 - (vi) Any other relief the Court may deem fit to grant.
 - (vii) An order that the costs of this suit be provided for.
4. The Petitioners filed their submissions on 17 January 2020, while the Respondents filed joint submissions on 12 March 2021.
5. The Petitioners identified the Issues for determination as:
 - (i) Whether there was effective public participation relating to the census exercise.
 - (ii) Whether there was a need for a transparent census exercise without conflict of interest, anomalies and open bias as alluded by the Petitioners during recruitment.
 - (iii) Whether the Petition has merit.
 - (iv) Whether the Constitution was violated and the Court should intervene.
6. The Respondents, on their part, identified the Issues for consideration as:

(i) Whether the Petition has met the threshold of a constitutional Petition?

(ii) Whether the Petition violates the *sub judice* rule and the overriding objective under section 1B of the Civil Procedure Act?

(iii) Whether the Petitioners should be granted the conservatory orders prayed for in the Petition?

7. The Court has considered the Petition, affidavits and submissions.

Sub judice/res judicata

8. The Petitioners herein filed Kisumu Petition No. 22 of 2019, *Michael Kojo Otieno & Ors v Homa Bay County Commissioner & Ors* and judgment was delivered on 25 June 2020.

9. The remedies sought therein included:

(i)

(ii) A declaration that the exercise by the 1st, 2nd and 4th respondents is unconstitutional, null and void for lack of public participation.

10. Amongst the findings by the Court in paragraph 33 was that

In the present case, the Court finds no inhibition or conflict in a Public servant being recruited in a temporary time-bound capacity to conduct national census, especially in managerial and supervisory capacities where experience gained in civil service gives such public officers a cutting edge over and above non – experienced and mostly young persons who must necessarily be employed in the vanguard roles of the census exercise.

11. A simple glimpse of the prayers in Kisumu Petition No. 22 of 2019 and the findings by the Court leave no doubt that the Issues as identified by the Petitioners in the present Petition were up for examination in the earlier Petition.

12. A party should always place the whole of his case at once and not litigate through instalments. The Petitioners appear to have chosen a path of litigating by instalments.

13. The Court will therefore agree with the Respondents that the Petitioners grievances herein were the subject of previous litigation at the time the Petition was filed and was, therefore, *sub judice*.

14. Since the Court had already determined the early Petition, the Issues raised herein are also *res judicata*.

15. It is unfortunate that the Petitioners did not disclose that there was a pending Petition which had challenged the constitutionality and or legality of the 2019 census at the time they filed this Petition.

16. The Court, in the circumstances, finds the Petition an abuse of the court process.

17. And if the Court were wrong on that conclusion, it is also of the view that the Issues raised by the Petitioners do not fall within its jurisdiction.

Conclusion and Orders

18. In light of the above, the Petition is dismissed with costs.

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

Radido Stephen, MCI Arb

Judge

Appearances

Petitioners in person

For Respondents Ms Oyugi, Senior Litigation Counsel, Office of the Attorney General

Court Assistant Chrispo Aura