



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**PETITION NO. E011 OF 2020**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES**

**1, 2, 3, 10, 73, 174, 175, 232 AND 235 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF SECTIONS 5 AND 6 OF**

**THE PUBLIC APPOINTMENTS (COUNTY ASSEMBLY APPROVAL) ACT, 2017**

**BETWEEN**

**SAMMY MUGITA.....PETITIONER**

**v**

**VIHIGA COUNTY PUBLIC SERVICE BOARD.....RESPONDENT**

**AND**

**JAMES OTARI MUHANJL.....INTERESTED PARTY**

**JUDGMENT**

1. The Court gave comprehensive directions on 4 December 2020 with a view to the expeditious and proportionate determination of the Petition herein.
2. The directions included the service of the Motion and Petition and the filing and exchange of affidavits and submissions within set timelines.
3. The Respondent, however, filed a Notice of Preliminary Objection on 23 December 2020 contending that:
  - (i) The Petition (and the application) raises no Constitutional Issues to warrant the jurisdiction of the Honourable Court in the manner sought or at all.
  - (ii) The Issues raised in the Cause falls within the oversight role of the County Assembly and the appellate powers conferred by law upon the Public Service Commission.
  - (iii) The jurisdiction of this Honourable Court to entertain the Petition is expressly ousted by the Constitution and the law.
  - (iv) The Petition amounts to gross abuse of the process of the Honourable Court and well-established principles of the onus of proof in litigation.

4. The Petitioner was expected to file and serve submissions on or before 18 December 2020. The submissions were not on record by the set date nor by today morning.
5. The Respondent's and the Interested Party's submissions were also not on record.
6. A Petition is ordinarily prosecuted through submissions. By failing to file and serve the submissions, the Petitioner has failed to prosecute the Petition and therefore, it is ripe for dismissal.
7. And even if the Court were wrong on that conclusion, the Court would still have dismissed the Petition on the following grounds.
8. One, the Petition was essentially challenging the appointment and/or placement of the Interested Party in job group S.
9. The Petitioner did not demonstrate that the Board had issued a contract to the Interested Party or the terms and conditions of service of such contract.
10. Under the County Governments Act, it is the function of the County Public Service Board to set the terms and conditions of service of county service employees on the advice from the Salaries and Remuneration Commission.
11. Two, there was equally no evidence placed before the Court that the Interested Party had been placed in job group S or that his qualifications and experience did not merit such placement.
12. Three, the setting of terms and conditions of service of staff comprising the county public service is regulated directly by statute and not the supreme law, and the purported challenge herein could have been made under the statute without needlessly invoking the name of the Constitution.
13. Lastly, there is no evidence on record in the form of an affidavit of service to show that the Petitioner had served the Petition and Motion on the Interested Party who stood to be adversely affected by the orders sought.
14. For the above reasons, the Petition is dismissed with costs to the Respondent.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 17<sup>TH</sup> DAY OF MARCH 2021.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For Petitioner Ngigi Njuguna & Co. Advocates

For Respondent Esther Andisi, Principal Legal Counsel

For Interested Party did not participate

Court Assistant Chrispo Aura