



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. E004 OF 2021

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), 10(2), 73(1)(b), 232(1)(d),(e) & (f) AND 259(1) & (3) OF THE CONSTITUTION OF KENYA.

AND

IN THE MATTER OF THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 24, 27, 28, 43, 46, 47, 73, 232 AND 259 OF THE CONSTITUTION

AND

IN THE MATTER OF THE ALLEGED VIOLATION OF SECTIONS 3, 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT AS READ WITH THE COUNTY GOVERNMENTS ACT, 2012

AND

IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY OF AN ADVERT ISSUED BY AN IMPOSTOR WHO IS NOT AN AUTHORISED SIGNATORY OFFICER TO THE HOMA BAY COUNTY PUBLIC SERVICE BOARD

AND

IN THE MATTER OF CONSTITUTIONAL AND LEGAL VALIDITY OF IMPLEMENTATION OF A DISPUTED ADVERT WITHOUT THE INPUT OF COUNTY PUBLIC SERVICE BOARD MEMBERS AS PER THEIR LETTER DATED 12TH JANUARY 2021.

AND

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION, DELEGATUS DELEGARE NON-POTEST AND VOID AB INITIO

BETWEEN

MICHEL KOJO OTIENO.....1st PETITIONER

EVANCE OTIENO OLOO GOR.....2nd PETITIONER

VERSUS

LAMECK OTIENO OGOT, DIRECTOR RECRUITMENT

& SELECTION ADMINISTRATOR.....1st RESPONDENT

HOMA BAY COUNTY PUBLIC SERVICE BOARD2nd RESPONDENT

COUNTY SECRETARY, HOMA BAY.....3rd RESPONDENT

COUNTY GOVERNMENT OF HOMA BAY4th RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION..... INTERESTED PARTY

JUDGMENT

1. Michael Kojo Otieno and Evance Otieno Oloo Gor (the Petitioners) lodged a Petition with the Court on 19 January 2021 contending that an advert published on 11 January 2021 by the Director Recruitment and Selection/Administrator (the 1st Respondent) on behalf of the County Public Service Board, Homa Bay was unlawful as the County Public Service Board had not approved it.
2. The action, the Petitioners, asserted violated the Constitutional values and principles of transparency and prudent use of public resources. The Petitioners cited several provisions of the Constitution as set out in the intitulement hereinabove. The Petitioners further asserted that the County Public Service Board had not delegated any of its functions to its Director of Recruitment.
3. The Petitioners sought orders:
 - (i) A declaration that the Respondents have threatened and violated the Constitution of Kenya, 2010, the County Governments Act, the Fair Administrative Action Act, 2015 and the Public Finance Management Act, 2015.
 - (ii) A declaration that the advert dated 11th day of January 2021 at pages 11 of the Monday Standard Newspaper is invalid, void and of no legal effect.
 - (iii) An order declaring that the Respondents acted outside the law in giving misleading information to the members of the public without the input and recommendations of the Board members hence detrimental to benefit the Kenyan taxpayers/consumers to services offered by public entities.
 - (iv) Costs of the Petition be provided for by the Respondents herein.
 - (v) Any other relief the Court may deem just to grant.
4. The Petitioners filed a Motion under a certificate of urgency at the same time.
5. When the Motion was placed before the Court, it directed that service be effected upon the Respondents and Interested Party for purposes of giving directions.
6. On 21 January 2021, the firm of Otieno, Yogo, Ojuro & Co. Advocates filed a Memorandum of Appearance on behalf of all the Respondents.
7. On the same day, the firm of Bruce Odeny & Co. Advocates filed a Notice of Appointment to act for the County Public Service Board.
8. Gladys J. Rutto Advocate also filed a Memorandum of Appearance to act for the Ethics and Anti-Corruption Commission on 21 January 2021.
9. When the parties appeared before the Court on 21 January 2021, a dispute over representation of the County Public Service Board was mentioned by the Petitioners.
10. The Court directed Mr Yogo and Mr Odeny to resolve the dispute on representation between themselves and the instructing clients.
11. At the same session, the Court gave comprehensive directions as a result of which the following were filed:
 - (i) A Notice of Change of Advocates by Bruce Odeny & Co. Advocates to act for the County Public Service Board on 3 February 2021.
 - (ii) A replying affidavit by Elijah Odondi Kodoh on behalf of the County Public Service Board on 10 February 2021.
 - (iii) A replying affidavit by Daniel Omondi Ogada on behalf of the County Public Service Board on 12 February 2021.
 - (iv) A replying affidavit by Caroline W. Kamau on behalf of the Ethics and Anti-Corruption Commission on 11 February 2021.
 - (v) Submissions by the Petitioners on 19 February 2021.
 - (vi) Further affidavit by the 1st Petitioner on 19 February 2021.

- (vii) A supplementary affidavit by Daniel Omondi Ogada on behalf of the County Public Service Board filed on 23 February 2021.
- (viii) Submissions by the Respondents filed on 26 February 2021.
- (ix) Further replying affidavit by Elijah Odondi Kodoh filed on 26 February 2021.
- (x) Notice of Change of Advocate by Otieno, Yogo, Ojuro & Co. Advocates to act for the County Public Service Board filed on 26 February 2021.
- (xi) Notice of Change of Advocate by Bruce Odeny & Co. Advocates to act for the County Public Service Board on 5 March 2021.
- (xii) Submissions by the County Public Service Board filed on 5 March 2021 by Bruce Odeny & Co. Advocates.

12. In their submissions, the Petitioners identified the Issues in disputation as:

- (i) Whether the 1st Respondent is allowed to advertise for the vacancies?
- (ii) Whether the Court has jurisdiction to determine the matter herein?
- (iii) Whether the Petitioners have established a prima facie case against the Respondents?
- (iv) Whether the Respondents have threatened or violated the Constitution and statutes?
- (v) Whether costs are payable?

13. The Respondents, on their part, identified the Issues for determination as:

- (i) Whether the 2nd Respondent has violated any law or the Constitution?
- (ii) Whether Daniel Omondi Ogada and Collins Agutu are members of the County Public Service Board?
- (iii) Representation of the County Public Service Board.
- (iv) Whether the Petitioners have met the threshold for grant of orders?

14. The Ethics and Anti-Corruption Commission did not file its submissions (if any).

15. The Court has considered the material placed before it and will largely adopt the Issues as identified by the parties.

Jurisdiction

16. The Respondents did not challenge the jurisdiction of the Court, and the Court finds it strange that the Petitioners who approached the Court would want the Court to address the question of jurisdiction.

17. The Court declines the invitation.

Representation of the County Public Service Board

18. Courts rarely go behind the record to establish and/or confirm whether an advocate has been instructed to act for a party.

19. As far as the record is concerned, when the firm of Otieno, Yogo, Ojuro & Co. Advocates filed a Memorandum of Appearance on behalf of the Respondents on 21 January 2021, it was validly on record for all of them until the firm of Bruce Odeny & Co. Advocates filed a Notice of Appointment/ Notice of Change of Advocate to act for the County Public Service Board on the same day and/or on 3 February 2021.

20. Purely based on the record, the firm of Bruce Odeny & Co. Advocates ceased to act for the County Public Service Board on 26 February 2021 when the firm of Otieno, Yogo, Ojuro & Co. Advocates filed a Notice of Change of Advocate.

21. The filing of the Notices of Change of Advocate however turned into a regrettable circus because the firm of Bruce Odeny & Co. Advocates filed another Notice of Change of Advocate to act for the County Public Service Board on 5 March 2021.

22. The turn of events has compelled the Court to go behind the Notices.

23. The dispute for the representation of the County Public Service Board herein is not that straightforward.

24. The filings of Notices reveal uncertainty on the membership of the County Public Service Board, hence the parallel instructions to different law firms. The same also suggest vicious infighting within the County Public Service Board.

25. In Kisumu Petition No. 42 of 2019, *Daniel Omondi Ogada & Ors v County Assembly of Homa Bay & Ors* (2020) eKLR, the Court quashed the decision of the Governor to relieve Daniel Omondi Ogada, Collins Odhiambo Ogutu and Tobias Odundo of their membership of the County Public Service Board. The judgment was delivered on 15 October 2020.

26. However, on 11 December 2020, the Court granted a stay of execution of the judgment pending Appeal, on certain conditions, which appear to have been complied with so far.

27. The effect of the stay order is that the decision of the Governor to relieve Daniel Omondi Ogada, Collins Odhiambo Ogutu and Tobias Odundo of their membership of the County Public Service Board was maintained.

28. The said persons cannot, therefore, make valid and/or binding decisions, including instructing advocates to act on behalf of the County Public Service Board.

29. Consequently, the Court is of the view that the instructions dated 20 January 2021 to Bruce Odeny & Co. Advocates were invalid.

The lawfulness of the advertisement of 11 January 2021 Quorate meeting of the County Public Service Board

30. The function of human resource at the county government level is bestowed upon the County Public Service Board by section 59 of the County Governments Act.

31. Section 58 of the Act provides for the composition of the County Public Service Board to be not more than 7 persons.

32. The Respondents produced minutes of a meeting of the County Public Service Board held on 6 January 2021. The minutes show that the meeting was attended by 4 Board members, and the 1st Respondent was taking minutes.

33. The Minutes of 6 January 2021 show that the members considered a request from the County Government and resolved to recruit for the positions of Director of Inspectorate, Enforcement Constables, Ward Administrators and County Attorney, which positions were advertised on 11 January 2021.

34. The Court is satisfied that the meeting was quorate and it approved a resolution to advertise for the positions requested by the County Government.

Unlawful delegation

35. The Petitioners also challenged the advertisement on the ground that the delegation to advertise to the 1st Respondent was unlawful.

36. Section 86(1) of the County Governments Act allows a County Public Service Board to delegate in writing any of its functions to a named county public officer.

37. However, the Respondents did not exhibit any evidence that the County Public Service Board had delegated to its Director of recruitment (1st Respondent) the duty to advertise the vacancies on 11 January 2021.

38. Despite the failure to exhibit a copy of the written delegation instrument, it was not disputed that the 1st Respondent was an employee of the County Public Service Board in the position of Director of Recruitment.

39. In the view of the Court, and considering that there was a substantive resolution to advertise made by the County Public Service Board, the omission to delegate to the 1st Respondent is a minor irregularity that does not vitiate the advertisement.

The hiring of Environment Officers

40. The Petitioners did not amend the Petition to include a challenge to the purported hiring of 4 Environmental Officers. They introduced the challenge through the affidavits filed after the Petition and in the submissions.

41. The Court declines to examine the challenge.

Conclusion and Orders

42. From the foregoing, the Court finds no merit in the Petition, and it is dismissed.

43. Since the litigation was in the public interest, the Court orders each party to bear their own costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 10th day of March 2021.

Radido Stephen, MCI Arb

Judge

Appearances

Petitioners in person

For Respondents Otieno, Yogo, Ojuro & Co. Advocates

Court Assistant Chrispo Aura