



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**PETITION NO. 31 OF 2019**

**IN THE MATTER OF ARTICLES 1, 2, 3, 27, 35, 41, 47, 73, 75, 156, 232, 233, 234 AND 236 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE OFFICE OF THE ATTORNEY GENERAL ACT, 2012**

**AND**

**IN THE MATTER OF THE PUBLIC SERVICE COMMISSION ACT, 2012**

**AND**

**IN THE MATTER OF THE NATIONAL GOVERNMENT CO-ORDINATION ACT, 2013**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**BETWEEN**

**HERINA ACHIENG OWINO.....PETITIONER**

**v**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT**

**PRINCIPAL SECRETARY, MINISTRY OF INTERIOR**

**& COORDINATION OF NATIONAL GOVERNMENT....3<sup>RD</sup> RESPONDENT**

**REGIONAL COORDINATOR, NYANZA PROVINCE....4<sup>TH</sup> RESPONDENT**

**DEPUTY COUNTY COMMISSIONER,**

**NYAKACH SUB-COUNTY.....5<sup>TH</sup> RESPONDENT**

**COUNTY COMMISSIONER, KISUMU COUNTY.....6<sup>TH</sup> RESPONDENT**

**AND**

**JOHN ODHIAMBO OTIENO.....1<sup>ST</sup> INTERESTED PARTY**

**JACOB OMONDI OGEJO.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

1. On or around 6 September 2018, the Respondents advertised for Chief Grade II, Jimo East Location. Further advertisements were made on 20 November 2018 and 8 January 2019. The advertisement(s) set out the minimum qualifications.
2. Among the applicants were Jacob Omondi Ogejo (2<sup>nd</sup> Interested Party) and Lucas Ouma Omollo (3<sup>rd</sup> Interested Party).
3. The 2 Interested Parties attended the interviews.
4. On 20 November 2018, the vacancy was re-advertised, and the Interested Parties attended the interviews, and John Odhiambo Otieno (the 1<sup>st</sup> Interested Party) was appointed as the Chief. His inauguration was set for 25 September 2019.
5. On 24 September 2019, Herina Achieng Owino (the Petitioner) moved the Court alleging that the appointment of the 1<sup>st</sup> Interested Party breached Articles 41, 47, 73 and 75 of the Constitution.
6. The Petitioner sought the following orders:
  - (i) A declaration that the entire process leading to the appointment of the 1<sup>st</sup> Interested Party as the Chief of Jimo East Location was unprocedural, irregular and could not form the basis of a correct decision.
  - (ii) A declaration that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> Respondents abdicated their constitutional and statutory duties and responsibilities in overseeing, participating in, sanctioning and accepting a flawed process that led to the appointment of the 1<sup>st</sup> Interested Party as Chief of Jimo East Location.
  - (iii) An order directing the 2<sup>nd</sup> Respondent to remove and/or terminate the appointment of the 1<sup>st</sup> Interested Party as the Chief Jimo East Location.
  - (iv) An order directing that the process of or leading to the appointment of the Chief Jimo East Location be commenced afresh.
  - (v) Costs of the Petition.
7. Filed together with the Petition was a Motion under a certificate of urgency seeking conservatory orders.
8. The Court certified the Motion urgent but did not issue *ex-parte* conservatory orders. The Petitioner was directed to serve the application.
9. When the Motion came for an *inter-partes* hearing on 16 December 2019, the Petitioner opted to withdraw it, noting that it had been overtaken by events.
10. The Court directed the Respondents to file their responses to the Petition and further that the parties file and exchange submissions within set timelines.
11. The Principal Secretary, Ministry of Interior, filed a replying affidavit on 7 February 2020.
12. When the parties appeared in Court on 11 March 2020, it turned out that submissions had not been filed, and the Court issued fresh directions on the filings.
13. The next time the Petition was placed before the Court was on 21 January 2021. On record was a further affidavit and submissions filed by the Petitioner on the same day.
14. The Petitioner raised 2 Issues in her submissions:
  - (i) Whether the Petition raised constitutional questions?
  - (ii) Whether the purported appointment of the 1<sup>st</sup> Interested Party was unlawful, null and void?
15. The Respondents sought more time to file submissions, and the Court gave them until 21 February 2021. The submissions were filed on 2 March 2021.
16. The Respondents identified 2 questions for the Court's adjudication:
  - (i) Was the process of appointing the 1<sup>st</sup> Interested Party free, fair and transparent?

(ii) Is the Petitioner entitled to the prayers sought?

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

**Whether the Petition raised Constitutional questions?**

18. The Respondents did not object to the competency of the Petition on the ground that it did not raise constitutional issues or that it did not meet the requisite threshold.

19. Although raised by the Petitioner, this question is therefore not ripe for the Court's determination.

**The lawfulness of appointment of the 1<sup>st</sup> Interested Party as Chief**

20. It is not disputed that all the Interested Parties applied for and were interviewed for the position of Chief, Jimo East Location.

21. Equally not disputed was that the 3<sup>rd</sup> Interested Party emerged the best candidate by scoring 84.25% against the 74% scored by the 1<sup>st</sup> Interested Party who was eventually appointed the Chief.

22. In challenging the lawfulness of the process, the Petitioner advanced several grounds.

23. The first ground was that it is only the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties who met the set qualifications. In other words, the Petitioner was contending that the 1<sup>st</sup> Interested Party did not meet the qualifications.

24. It was upon the Petitioner, as the person asserting so, to prove that the 1<sup>st</sup> Interested Party did not meet the set qualifications. The Petitioner did not discharge the burden as she did not place before the Court any pertinent particulars to support the contention, either in the form of academic or professional qualifications or records on the 1<sup>st</sup> Interested Party's conduct or lack thereof.

25. The Petitioner could have utilised the access to information law to access such information or issued to the Respondents a Notice to Produce.

26. The second ground on which the Petitioner impugned the process was that the first interviews were cancelled without giving reasons. She contended that the public raised complaints regarding the repeat process.

27. However, the Petitioner did not provide any evidence of these complaints and to whom they were addressed.

28. Nevertheless, the Respondents asserted that the repeat process was necessitated by the fact that the first process was flawed because the applicable human resource regulations were not followed. It was also deposed that the interview panel was improperly constituted and had to be reconstituted.

29. Regrettably, the Respondents did not reveal the specific provisions of the Regulations that were not complied with or disclose in what way the first interview panel was improper.

30. Since it is the Respondents who were privy to the reasons for the cancellation of the first recruitment process, they were under a duty to make a candid and full disclosure of the same.

31. Without the disclosure, the Court is left to speculate as to whether the reasons were genuine or valid, but the Court will leave it at that.

32. Thirdly, the Petitioner assailed the recruitment process on the ground of nepotism and favouritism. She alleged that the 1<sup>st</sup> Interested Party was related to a Principal Secretary and a former member of parliament for the area.

33. These allegations were outlined in a witness statement by the 3<sup>rd</sup> Interested Party. The witness statement was not introduced under oath, and the Court finds it of little probative value. These allegations could have been given credence if the 3<sup>rd</sup> Interested Party had filed an affidavit instead of a witness statement.

34. The last substantive ground on which the Petitioner challenged the appointment of the 1<sup>st</sup> Interested Party was that there was no public participation. She alleged that the advertisement was not published, and the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties only got to learn of the same on the eve of the interviews.

35. The re-advertisement issued by the Respondents was dated 20 November 2018. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties did not file affidavits to disclose how and when they learnt of the re-advertisement.

36. The Principal Secretary did not disclose in his replying affidavit whether, how and when the re-advertisement notice was publicised in order to enable the public to participate in the process.

37. Public participation in public appointments has now become a legal culture. It is part of the transparency and accountability expected of

the public service.

38. Further, public participation or stakeholder engagement and affording all interested persons adequate and equal opportunity in appointments to public office is a constitutional requirement pursuant to Article 232(1)(i) of the Constitution of Kenya.

39. Therefore, the members of the public have a right to participate and give their input prior to the appointment of one to a public office, where applicable. The requirement should not be overlooked since it is one of the values and principles of public service.

40. The Court finds that the recruitment process for the 1<sup>st</sup> Interested Party failed the public participation test.

#### **Conclusion and Orders**

41. Flowing from the above and the remedies which had been sought by the Petitioner, the Court orders:

(i) A declaration be and is hereby issued that the entire process leading to the appointment of the 1<sup>st</sup> Interested Party as the Chief of Jimo East Location did not comply with the constitutional values and principles of public participation.

(ii) An order directing the Respondents to remove and/or terminate the appointment of the 1<sup>st</sup> Interested Party as the Chief Jimo East Location.

(iii) An order directing the Respondents to commence the process of recruitment of the Chief Jimo East Location afresh.

42. The litigation was in the public interest. Each party to bear their own costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 21ST DAY OF APRIL 2021.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

For Petitioner M.I. Wafula & Co. Advocates

For Respondents Janet Langat, Deputy Chief Litigation Counsel, Office of the Attorney General

Court Assistant Chrispo Aura