



**REPUBLIC OF KENYA**

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

**PETITION NO E001 OF 2021**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 27, 28, 47, 50, 159 AND 165 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF RULES 3 & 4 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION) PRACTICE AND PROCEDURE RULES 2013 AND ALL OTHER ENABLING POWERS AND PROVISIONS OF THE LAW**

**AND**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 22, 23, 27, 43, 47 AND 48 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 4(3)(B), 5(2), 7(2)(II), 8(C), 9, 11(1) OF THE FAIR ADMINISTRATIVE ACTION ACT NO 4 OF 2015**

**AND**

**IN THE MATTER OF SECTIONS 8, 87, 88, 91, 96, 105, 106, 107 & 108 OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012**

**AND**

**IN THE MATTER OF THE COUNTY PUBLIC SERVICE BOARD OF KILIFI**

**AND**

**IN THE MATTER OF THE PREJUDICIAL DISCRIMINATORY AND MALICIOUS APPOINTMENT OF THE DIRECTOR OF ENVIRONMENT AND SUBSEQUENT DEPLOYMENT OF ONE JIMMY KAHINDI YAA INTO OFFICE**

**AND**

**IN THE MATTER OF ARTICLE 162(2) (A) OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**ZENA ACHIENG MOHAMED.....PETITIONER**

**AND**

**THE COUNTY PUBLIC SERVICE BOARD OF KILIFI.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY CHIEF OFFICER ENVIRONMENT, FORESTRY**

**NATURAL RESOURCES AND SOLID WASTE MANAGEMENT.....2<sup>ND</sup> RESPONDENT**

**JIMMY KAHINDI YAA.....3<sup>RD</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF KILIFI.....4<sup>TH</sup> RESPONDENT**

**THE COUNTY SECRETARY-KILIFI.....5<sup>TH</sup> RESPONDENT**

**ALFONCE B. MRIMA.....6<sup>TH</sup> RESPONDENT**

**ROSE NGOA.....7<sup>TH</sup> RESPONDENT**

**RULING**

1. On 22<sup>nd</sup> January 2021, the Petitioner filed a Petition seeking a permanent injunction, restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents from confirming, deploying and allowing the 3<sup>rd</sup> Respondent to assume office as the Director of Environment of the 4<sup>th</sup> Respondent and a further order of injunction restraining the 3<sup>rd</sup> Respondent from assuming office as the Director of Environment of the 4<sup>th</sup> Respondent.
2. In addition, the Petitioner seeks a declaration that she is the most qualified, competent and suitable applicant to occupy the position of Director of Environment as per the requirements and qualifications exhibited in the advertisement dated 16<sup>th</sup> September 2019.
3. Alongside the Petition, the Petitioner filed a Notice of Motion seeking an interim order of injunction restraining the 2<sup>nd</sup> and 4<sup>th</sup> Respondents from confirming, deploying and allowing the 3<sup>rd</sup> Respondent to assume office as the Director of Environment of the 4<sup>th</sup> Respondent before the hearing, determination and final disposal of the appeal lodged at the Public Service Commission by the Petitioner against the decision of the 1<sup>st</sup> Respondent appointing the 3<sup>rd</sup> Respondent as the Director of Environment of the 4<sup>th</sup> Respondent.
4. The Petitioner further seeks an interim order prohibiting the 3<sup>rd</sup> Respondent from assuming office as the Director of Environment of the 4<sup>th</sup> Respondent.
5. The Notice of Motion went before my brother, **Ongaya J** who, on 27<sup>th</sup> January 2021, issued an order staying implementation of the appointment decision as conveyed in the 1<sup>st</sup> Respondent's letter dated 16<sup>th</sup> December 2020.
6. Subsequent to the Petition and Notice of Motion, the 1<sup>st</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents raised a Preliminary Objection challenging the jurisdiction of the Court to entertain the Petition and the Notice of Motion.
7. In similar fashion, the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents filed a notice of Preliminary Objection dated 2<sup>nd</sup> February 2021 on the following grounds:
  - a) The Petition is incurably defective, an abuse of the court process and should be dismissed with costs to the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents;
  - b) The Court lacks jurisdiction to hear and determine the Petition pursuant to the mandatory provisions of Article 233 and 234(2)(i) of the Constitution of Kenya, 2010 read together with Section 85(a) of the Public Service Commission Act, 2017 and Section 77(1) & (2) of the County Governments Act;
  - c) The suit is *sub judice* the appeal before the Public Service Commission;
  - d) The Petition is an affront to the doctrine of exhaustion;
  - e) The 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents are not proper parties to the Petition and should be struck out from the proceedings;
  - f) The Petition as preferred violates the mandatory provisions of law and laid down procedures and cannot sustain the prayers sought; and
  - g) In light of the foregoing, it is clear that the Petition filed herein has been filed prematurely and in any case, without jurisdiction and for this reason alone, the Petition should be dismissed with costs.

8. The Petitioner filed a joint response to the two Preliminary Objections.

9. The gist of the twin Preliminary Objections raised by the Respondents is that until the Petitioner exhausts the appeal process at the Public Service Commission as provided under the County Governments Act and the Public Service Commission Act, she cannot come to Court.

10. In urging their Objections, the Respondents relied on Section 77 (2)(a) of the County Governments Act which provides as follows:

***(2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of-***

***(a)recruitment, selection, appointment and qualifications attached to any office;***

11. The Respondents also relied on Section 87(2) of the Public Service Commission Act, which provides:

***(2) A person shall not file any legal proceedings in any court of law with respect to matters within the jurisdiction of the Commission to hear and determine appeals from county government service unless the procedure provided under this Part has been exhausted.***

12. The position that employment disputes emanating from the county government public service should, in the first instance, be referred to the Public Service Commission, by way of an appeal, is not in doubt.

13. In ***Republic v National Environment Authority Ex Parte Sound Equipment Ltd [2011] eKLR***, the Court of Appeal held that a party should not be allowed to bypass the statutory appellate process provided under the County Governments Act and the Public Service Commission Act, save in exceptional circumstances.

14. A similar finding was made by the Court of Appeal in ***County Public Service Board (Wajir County) & another v Hulbhai Gedi Abdille [2017] eKLR***.

15. This is however, not what the current Petition and Notice of Motion present. In my understanding, the Petitioner is asking the Court to preserve the *status quo*, pending the hearing and determination of her appeal before the Public Service Commission.

16. I do not think the Court can lock out a party seeking interim relief, on the basis of the exhaustion principle provided under the County Governments Act and the Public Service Commission Act. I say so because, if the subject of appeal before the Public Service Commission dissipates, then the ultimate decision by the Commission could well be an exercise in futility.

17. The Petitioner submits that the appeal process before the Public Service Commission is long and tedious. I have looked at the ***Public Service Commission (County Government Public Services Appeals Procedures) Regulations, 2016*** and did not find any timelines given to the Public Service Commission within which to conclude appeals emanating from the County Governments. I also did not see any provision for interim relief pending determination of appeals lodged with the Commission. The effect of this is that actions forming the subject matter of appeals before the Commission could become entrenched and irreversible. In such an event, the resultant injustice to appellants would be great and the Court cannot ignore this exposure.

18. Based on the foregoing conclusions, I hold that the twin Preliminary Objections raised by the Respondents are without basis and are overruled, with costs being in the Petition.

19. I direct that this file be placed before **Ongaya J** on **20<sup>th</sup> April 2021**, for purposes of taking directions on disposal of the Petition and Notice of Motion filed on 22<sup>nd</sup> January 2021.

20. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 15<sup>TH</sup> DAY OF APRIL 2021**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Minyazi for the Petitioner

Mr. Njoroge Mwangi for the 1<sup>st</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents

Mr. Bwire for the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents