



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

PETITION NO. 2 OF 2019

PUBLIC INTEREST LITIGATION/PETITION IN THE MATTER OF UNCONSTITUTIONAL,

ILLEGAL, IRREGULAR AND DISCRIMINATORY DECISION OF THE

COUNTY ASSEMBLY OF BUNGOMA SERVICE BOARD TO

PROMOTE SOME MEMBERS OF STAFF

AND

**IN THE MATTER OF ABUSE OF OFFICE AND NON ADHERENCE TO THE RULE OF LAW
AND DUE PROCESS BY THE COUNTY ASSEMBLY SERVICE BOARD IN ADVERTISEMENT OF**

POSITIONS FOR EMPLOYMENT CONTRARY TO THE CONSTITUTION OF KENYA, 2010,

EMPLOYMENT ACT, 2007, COUNTY GOVERNMENTS ACT, 2012,

COUNTY ASSEMBLIES SERVICES ACT, 2017,

PUBLIC OFFICERS ETHICS ACT, 2003 AND

THE LEADERSHIP AND INTEGRITY ACT, 2012

BETWEEN

BARASA KUNDU NYUKURI.....PETITIONER

VERSUS

COUNTY ASSEMBLY SERVICE BOARD.....1st RESPONDENT

SPEAKER/CHAIRMAN OF THE COUNTY ASSEMBLY SERVICE BOARD.....2nd RESPONDENT

CLERK/SECRETARY OF THE COUNTY ASSEMBLY SERVICE BOARD.....3rd RESPONDENT

LEADER OF MAJORITY.....4th RESPONDENT

LEADER OF MINORITY.....5th RESPONDENT

RAEL KHISA, MEMBER OF THE COUNTY ASSEMBLY SERVICE BOARD.....6th RESPONDENT

ANTONY SIMIYU MABELE,

MEMBER OF THE COUNTY ASSEMBLY SERVICE BOARD.....7th RESPONDENT

ANNE NANGONI WEKESA, HEAD OF HUMAN RESOURCE.....8th RESPONDENT

RULING

1. On 5 April 2019, Barasa Kundu Nyukuri (the Petitioner) lodged a Petition with the Court in Bungoma alleging that the County Assembly Service Board of Bungoma (the Board) had failed to uphold the constitutional values and principles in the discharge of its mandate and more so in regard to career development and management.
2. The Petitioner sought the following reliefs:
 - (i) Grants stay order in respect to the recently advertised and on-going recruitment process until this application/Petition is heard and determined by this Honourable Court of law in whichever manner it deems fit.
 - (ii) THAT grading and remuneration of all officers in the service of the Bungoma County Assembly prior to the purported harmonisation/realignment shall remain in force.
 - (iii) Declares that the harmonisation, promotion, realignment and grading of officers in the service of the Bungoma County Assembly in the month of July 2018 was unconstitutional, unlawful, irregular, ultra vires and therefore null and void.
 - (iv) THAT costs of this case be met by the individually and severally by office bearers in the Bungoma County Assembly Service Board (CASB).
3. On the same day, the Petitioner filed a Motion under a certificate of urgency seeking orders:
 - (i) ...
 - (ii)
 - (iii) THAT the Respondents herein has failed to follow the rule of law and due process in the on-going recruitment process of County Assembly Service employees contrary to provisions in Articles 3, 10, 27, 28, 41, 47, 48, 50, 73, 232 and 234 of the Constitution of Kenya, 2010, section 12 of the County Governments Act, 2012 read together with section 5 of the Employment Act, 2007, sections 25 and 45 of the County Assemblies Services Act, 2017.
 - (iv) The 1st to 8th Respondents have already kicked off the process of recruitment as evidenced from the advertisement in the Daily Nation newspapers dated 25th February 2019 made by the 3rd Respondent herein that is annexed on the verifying affidavit of this application.
 - (v) Your applicant is apprehensive about the level of impunity, arrogance, partiality and lack of integrity displayed by the 1st to 8th Respondents in their execution of the said recruitment process.
 - (vi) THAT your applicant is apprehensive that this application and Petition will be prejudiced if the on-going recruitment process is allowed to continue yet this application has sufficient grounds and chances of succeeding.
 - (vii) THAT the current recruitment exercise by the 1st to 8th Respondents if permitted to go on, will be tantamount to abuse of the independence, dignity and integrity of this Honourable Court, especially its special and supervisory jurisdiction under Article 162(2) (a) of the Constitution of Kenya, 2010, with regard to all disputes related to employment and labour relations in all state organs including the Bungoma County Assembly Service Board, represented by the 1st to 8th Respondents herein.
4. On 5 April 2019, the Deputy Registrar, Bungoma directed that the application be placed before the Duty Judge in Nairobi.
5. When the application was placed before the Duty Judge in Nairobi on 8 April 2019, the Judge certified it urgent and directed that it be served upon the Respondents ahead of *inter-partes* hearing on 17 April 2019.
6. On 17 April 2019, the Respondents asked for more time to respond to the application.
7. The Court directed the Petitioner to file and serve a further affidavit within 7-days, and the Respondents to file and serve grounds of opposition and replying affidavits within 14-days of the Petitioner serving his further affidavit.
8. At the same session, the Court issued an order *restraining the Respondents from carrying on any shortlisting, interviews, recruitment of staff pending inter-partes hearing of the application.*
9. The Court also transferred the Petition to Kisumu.
10. On 25 April 2019, the Petitioner filed another Motion seeking an order that the Respondents advocate on record was conflicted and

could not represent them.

11. The said advocate filed a replying affidavit and list of authorities in opposition to the Motion on 7 June 2019.

12. On 28 January 2020, the Court directed that the new application be heard on 24 March 2020.

13. The next time the file was placed before the Court was on 8 February 2021, when the Respondents filed a Motion seeking orders:

(i) ...

(ii) THAT this Honourable Court be pleased to review, vary, set aside, vacate and/or discharge the orders made in the matter herein on 17th April 2019 restraining the applicant from carrying on any shortlisting, interviews, recruitment or deployment of staff.

(iii) THAT the Honourable Court be pleased to issue directions to facilitate the speedy disposal of the matter herein.

(iv) THAT costs of this application be provided for.

14. The Petitioner filed a Notice of Preliminary Objection and Response to the Motion on 1 March 2021, and the Court gave directions on this latter Motion on 2 March 2021.

15. In terms of the directions, the Respondents submissions should have been filed and served on or before 19 March 2021. The submissions were not on record by the aforesaid date.

16. The Petitioner filed a 66 paged replying affidavit, a 293 page Preliminary Objection and submissions on 26 March 2021.

17. The Court has considered the record, the Motion dated 8 February 2021, the affidavits and submissions and come to the view that the application should be allowed for the reasons given hereunder.

18. One, it is not in dispute that on 17 April 2019, the Court granted temporary injunctive relief pending *inter-partes* hearing of an application by the Petitioner dated 4 April 2019.

19. Order 40 Rule 4(2) of the Civil Procedure Rules under which temporary injunctions are granted (unlike conservatory orders which are provided for under the Constitution and the applicable rules) is clear that an *ex-parte* injunction shall not last for more than 14-days.

20. Such an *ex-parte* injunction may be extended by consent of all the parties for another 14-days.

21. There is nothing on record to show that there was consent to extend the temporary orders issued on 17 April 2019 after the lapse of 14-days.

22. In any case under Order 40 Rule 6 of the Civil Procedure Rules, injunctions lapse by operation of the law if the suit is not determined within 12 months. Nearly 2 years have lapsed since the Court granted the orders sought to be set aside.

23. Two, the Petition had been pending for nearly 2 years by the time the Respondents moved the Court on 8 February 2021.

24. There is no sufficient explanation by the Petitioner why he did not cause to be determined the Petition as expeditiously as possible.

25. The contention that the Respondents had not filed or served their responses/replying affidavits hold no water for there is legal provision to proceed with proceedings where Respondents have not filed responses.

26. Three, the application for injunctive orders dated 4 April 2019 was anchored on lack of an appropriate legislative and policy framework for human resource function in the County of Bungoma.

27. The Respondents have now demonstrated that there is in place the Bungoma County Assembly Service Regulations, 2020 made under the County Assembly Services Act. The Regulations were gazetted on August 2020.

28. The Respondents have also demonstrated that there is in place a County Assembly of Bungoma Internship Policy, July 2020, a County Assembly of Bungoma Staff Training and Development Policy, August 2020 as well as a County Assembly of Bungoma Industrial Attachment Policy.

29. In light of the foregoing the Courts orders:

(i) The temporary injunction granted on 17 April 2019 stands vacated by operation of the law and the reasons given above.

(ii) The Petition to be heard on an accelerated basis.

(iii) The Petitioner to file and serve submissions on the Petition on or before 13 May 2021.

(iv) The Respondents to file and serve their submissions on or before 13 June 2021.

(v) Mention on 14 June 2021 to confirm compliance and to give judgment date.

30. Costs in the cause.

Delivered through Microsoft teams, dated and signed in Nairobi on this 13th day of April 2021.

Radido Stephen, MCI Arb

Judge

Appearances

Petitioner in person

For 1st – 4th Respondents J.O. Makali & Co. Advocates

For 5th – 8th Respondents Wasilwa & Co. Advocates

Court Assistant Chrispo Aura