



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. E007 OF 2021

**IN THE MATTER OF THE ENFORCEMENT OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 162(2)(a), 258 AND 259(1) OF THE
CONSTITUTION OF THE REPUBLIC OF KENYA**

AND

**IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF THE RIGHTS AND FREEDOMS IN ARTICLES 25,
27, 28, 33, 35, 41, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF SECTION 13 OF THE COUNTY GOVERNMENTS
ACT NO. 17 OF 2012**

AND

IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE EMPLOYMENT ACT, NO. 11 OF 2007

BETWEEN

CALVINCE ODOYO

PETITIONER

v

HOMA BAY COUNTY ASSEMBLY SERVICE BOARD

1st RESPONDENT

SPEAKER OF THE HOMA BAY COUNTY ASSEMBLY

2nd RESPONDENT

HOMA BAY COUNTY ASSEMBLY

3rd RESPONDENT

JUDGMENT

1. On 11 January 2021, the County Assembly Service Board of Homa Bay (the Board) advertised for the position of Clerk of the County Assembly.
2. Calvince Odoyo (the Petitioner) felt that the qualifications set by the Board were not those contemplated by the law, and on 25 January 2021, he lodged a Petition in Court together with a Motion under a certificate of urgency seeking to interdict the recruitment.
3. On 1 February 2021, the Court directed that both the Motion and Petition would be taken together. The parties were directed to file and exchange affidavits and submissions ahead of judgment delivery on 5 May 2021.
4. Pending the delivery of the judgment, the Court issued a conservatory order interdicting the recruitment process.
5. On 5 February 2021, the Board caused to be published a re-advertisement.

6. The new development prompted the Petitioner to file a fresh application on 10 February 2021.
7. When the Motion came up for directions/hearing on 15 February 2021, the Court dismissed it because the Petitioner was not in attendance.
8. The very same day, the Petitioner filed a Motion seeking an order setting aside the order of dismissal, and the Court directed the Petitioner to serve the application ahead of hearing on 17 February 2021.
9. The Court heard brief oral submissions from the parties and reinstated the dismissed application.
10. The Court also heard submissions on the reinstated application but dismissed it because the factual basis for the orders sought had changed, and the Petitioner had not amended his pleadings to reflect the new developments.
11. The Petitioner filed an amended Petition and another application dated 19 February 2021.
12. The reliefs sought in the Amended Petition were:
 - (i) A declaration that the Respondents have jointly and severally violated the Petitioner's fundamental rights and freedoms as protected under Articles 27, 28, 41, 47 and 55 of the Constitution.
 - (ii) A declaration that the Petitioner be compensated the amount of money that the Court deems sufficient and/or appropriate by the Respondents for the violation of the Petitioner's rights and fundamental freedoms under Articles 27, 28, 41, 47 and 55 of the Constitution.
 - (iii) This Honourable Court be pleased and do hereby grant an order of permanent injunction restraining the Respondents, their representatives, employees, servants and/or agents or anybody working or for them recruiting the Clerk of Homa Bay County Assembly as stipulated in the advertisement of a vacant position published in print media (Standard and Nation Daily Newspapers) of 11 January 2021 or as stipulated in the re-advertisement of a vacant position published in print media (Standard Newspaper) of 5 February 2021 or at all and/or shortlisting and/or interviewing any candidates for the position of the Clerk of Homa Bay County Assembly.
 - (iv) General and punitive damages.
 - (v) Any other or further relief that this Honourable Court may deem fit to grant.
 - (vi) The costs of this application be provided for.

13. The Court gave directions on the fresh Motion and Amended Petition on 23 February 2021. Judgment was reserved for 13 April 2021.

14. As a consequence, the following were filed:

- (i) Replying affidavit by the Clerk of the Assembly on 19 March 2021 (should have been filed/served before 10 March 2021).
- (ii) Replying affidavit by the Speaker on 25 March 2021 (should have been filed/served before 10 March 2021).
- (iii) Submissions by the Petitioner on 29 March 2021.
- (iv) Further affidavit by the Petitioner on 29 March 2021.
- (v) Submissions by the Board on 6 April 2021.

15. The Court has considered the Amended Petition, Motion, affidavits and submissions.

Competence of the Petition

16. The Board raised an objection on the competency of the Petition on the grounds that the Petitioner had not demonstrated any nexus with the County of Homa Bay, had not presented evidence that he qualified for the position of Clerk of the Assembly and that the reliefs sought were not self-sustaining.

17. The objections raised by the Board, with due respect, require an examination of the evidence produced by the parties and a determination of whether the evidence is sufficient to warrant the grant of the reliefs prayed for.

18. In the circumstances, the Court finds the competency objections as misplaced.

Judicial overreach

19. The Board also urged the Court not to entertain the Amended Petition or grant the remedies sought on the ground that that would amount

to the Court micro-managing an employer. The cases of Nairobi Civil Appeal No. 50 of 2014, *Judicial Service Commission v Gladys Boss Shollei, Rebecca Ann Maina v Jomo Kenyatta University of Agriculture and Technology* (2014) eKLR and *Alfred Nyungu Kimungui v Bomas of Kenya* (2013) eKLR were cited.

20. It is correct that Courts should be slow in intervening in decisions reserved for the employer's prerogative.

21. However, the office of a Clerk of a County Assembly is a public office, and both the Constitution and the County Assembly Service Act have expressly underpinned the norms, values and principles which govern the recruitment process.

22. The Petition herein was asserting that the Respondents had disregarded the norms, values and principles.

23. In such a case, this Court and any other competent Court has the jurisdiction to intervene to ensure that the recruitment process is carried out in compliance with the law.

Petition overtaken by events

24. The Board contended that the Petition had been overtaken by events as the position of Clerk had already been filed on or around 23 February 2021.

25. Although the appointment of one Owino Hannington O. Day as the Clerk of the Assembly is not directly under challenge in the instant proceedings, the Court must note that an order had been issued that morning in the presence of the Respondents advocates interdicting the recruitment and/or appointment process.

Lawful recruitment/qualifications

26. The Board initially advertised for the position of Clerk of the County Assembly on 11 January 2021. The Petitioner moved the Court to interdict the recruitment, and on 1 February 2021, the Court interdicted the process pending an *inter-partes* hearing.

27. On 5 February 2021, the Board re-advertised for the position. The re-advertisement indicated the qualifications as:

- (a) Be a Kenyan citizen.
- (b) Holds a Bachelor's degree in any social sciences from a university recognised in Kenya or its equivalent.
- (c) Has at least five years professional experience in parliamentary procedures and practices.
- (d) Meets the requirements of Leadership and Integrity as set out in chapter six of the Constitution of Kenya, 2010.
- (e) A senior management course from a recognised institution shall be an added advantage.
- (f) A Master's degree in social sciences from a recognised university in Kenya or its equivalent shall be an added advantage.

28. The Amended Petition asserted that the qualifications were unconstitutional, not contemplated by the statute and discriminatory.

29. According to the Petitioner, and citing *Chama Cha Mawakili (CCM) v Chairperson Independent Electoral and Boundaries Commission & 2 Ors* (2019) eKLR, the inclusion of qualifications that were not contemplated by statute was illegal, null and void.

30. The Petitioner also contended that the qualifications set out in the re-advertisement gave undue advantage to people with senior management course.

31. The qualifications one needs to be appointed as a Clerk of a County Assembly are set out in section 13(2) of the County Governments Act, and these are:

- (a) is a citizen of Kenya;
- (b) holds a degree from a university recognised in Kenya or its equivalent;
- (c) has had at least five years relevant professional experience;
- (d) meets the requirements of leadership and integrity set out in Chapter Six of the Constitution.

32. From the re-advertisement, it is clear that the Board included qualifications beyond those set out in the applicable statute.

33. The legality of including qualification not set out in the relevant statute has been the subject of previous judicial determination.

34. In *Wambua Maithya v Pharmacy and Poisons Board; Pharmaceutical Society of Kenya & 2 others (Interested Parties)* (2019) eKLR, the High Court stated:

In my view, it is clear that the prescriptions by the Board were so onerous as to permit only a few persons to apply for the vacant position. One does not understand why it was necessary to prescribe that an applicant must have a Master's degree when the parent legislation did not provide for the same. While such qualification may be considered at the stage of interview and in determining the suitability of the candidates, it is my view that imposing such a requirement at inception is inimical to the requirement that the recruitment be competitive as it amounts to locking out prospective applicants and granting the opening to only a few individuals. It is clearly a prescription that may be abused to pre-determine a person to recruit for the position.

35. In *Joy Brenda Masinde v Law Society of Kenya & Ar* (2015) eKLR, where the court stated that:

Contrary to the submissions by the 1st respondent this additional qualification was not expressed to be merely as an ideal qualification in the way that an advanced degree was expressed to be an added advantage. Rather this additional CPS qualification was stated as a mandatory minimum requirement for consideration for the post advertised. Thus a person not in possession of a CPS of five years standing was deemed not eligible to apply. It was, therefore, a requirement that determined whether or not a person would apply for the position.

36. In *Henry Mutundu v Chairperson, Independent Electoral and Boundaries Commission & Ar; Attorney General (Interested Party)* (2019) eKLR, this Court (differently constituted) stated:

Indeed the law is clear that the Respondent cannot couch an advertisement outside the legislative scope and their mandate. The Respondents, however, have a mandate to carry out their function within the law, which function also includes hiring the best manpower to carry out their functions. Section 10 of the Independent Electoral and Boundaries Commission (IEBC) Act, does not provide the minimum years of general work experience that the Chief Executive Officer (CEO) must have but this does not preclude the Respondent from making a decision on how best to carry out the recruitment process within its scope of work and the functionality of the office bearer. In carrying out this work, the Respondent must however work within the law. I do not wish to belabour on this issue since I have already pronounced myself on the same in my ruling alluded to herein. In determining this petition, I agree that the Respondent couched the advertisement for the position of the Independent Electoral and Boundaries Commission (IEBC) Chief Executive Officer (CEO) outside the provisions of the Independent Electoral and Boundaries Commission (IEBC)

37. In the Court's view, the jurisprudence on the inclusion of qualifications beyond those set out in the applicable statute appears settled, at least at this level of the judicial hierarchy.

38. The Board included in its re-advertisement the qualifications of Bachelor's degree in social sciences and experience in parliamentary practices and procedures.

39. These qualification was outside the statutory requirements. By including the qualifications, the Board was locking out persons who would have been qualified to apply.

40. The Court finds the re-advertisement was unlawful and void.

41. The Petitioner did not prove that his fundamental rights and freedoms were violated to warrant general or punitive damages.

Conclusion and Orders

42. From the foregoing, the most efficacious order to make and the Court does is that:

(i) A declaration be and is hereby issued that the re-advertisement for the position of Clerk, County Assembly by the County Assembly Board of Homa Bay on 5 February 2021 was illegal, null and void for including qualifications not contemplated by section 13(2) of the County Governments Act.

(ii) An order of permanent injunction be and is hereby issued restraining the Respondents, their representatives, employees, servants and/or agents or anybody working or for them recruiting the Clerk of Homa Bay County Assembly as stipulated in the re-advertisement of 5 February 2021 or at all and/or shortlisting and/or interviewing any candidates for the position of the Clerk of Homa Bay County Assembly.

43. The Petition was in the public interest. Each party to bear their own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 13TH DAY OF APRIL 2021.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioner Prof Tom Ojienda & Associates

For 1st Respondent Onsongo & Co. Advocates

For 2nd Respondent Owiti, Otieno & Ragot Advocates

For 3rd Respondent N.E. Mogusu & Associates

Court Assistant Chrispo Aura