



**REPUBLIC OF KENYA**

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

**PETITION NO. 5 OF 2020**

**IN THE MATTER OF ARTICLES 1, 2, 10, 22, 23, 27, 41, 47, 48, 73, 75,  
156, 191(2), 232, 235 AND 258 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES  
10, 27, 41, 47 AND 232 OF THE CONSTITUTION OF KENYA, 2010;**

**EMPLOYMENT ACT NO. 11 OF 2008, HEALTH ACT, COUNTY**

**GOVERNMENTS ACT AND THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015**

**AND**

**IN THE MATTER OF THE ALLEGED UNDERPAYMENTS AND  
MISTREATMENT OF THE NURSES ON CONTRACT IN BUNGOMA COUNTY**

**BETWEEN**

**MOSES WANJALA LUKOYE.....PETITIONER**

**v**

**CHAIRMAN, COUNTY PUBLIC SERVICE**

**BOARD OF BUNGOMA.....1<sup>st</sup> RESPONDENT**

**COUNTY SECRETARY, COUNTY**

**GOVERNMENT OF BUNGOMA.....2<sup>nd</sup> RESPONDENT**

**COUNTY PUBLIC SERVICE OF**

**BUNGOMA .....3<sup>rd</sup> RESPONDENT**

**COUNTY GOVERNMENT OF BUNGOMA.....4<sup>th</sup> RESPONDENT**

**AND**

**DAVIS JUMA.....1<sup>st</sup> INTERESTED PARTY**

**LILIAN NEKESA MABUNDE.....2<sup>nd</sup> INTERESTED PARTY**

AND

**ONE HUNDRED AND SEVENTY-THREE OTHER INTERESTED PARTIES**

**JUDGMENT**

1. Moses Wanjala Lukoye (the Petitioner) instituted these proceedings against the Respondents on 30 July 2020, alleging discrimination in remuneration/underpayments and that the termination of employment contracts of some nurses by the County Government of Bungoma was unlawful.

2. The Petitioner sought the following reliefs:

(i) A declaration that the Respondents have contravened Articles 10 and 232 of the Constitution in that the national values and principles of governance as set out have not been observed and those decisions regarding the employment of the nurses on contract require the utmost observance of the rule of law.

(ii) A declaration that the Interested Parties and others employed on contract in 2017 have been underpaid and treated unfairly.

(iii) Compensation of any damages caused by the underpayment and mistreatment of the Interested Parties.

(iv) Payment of salary and allowance arrears to the Interested Parties since 2017 that was occasioned by the underpayments and mistreatment.

(v) Employment of the Interested Parties in the first batch on permanent and pensionable terms.

(vi) This Honourable Court do issue such further orders and give such directions as it may deem fit to meet the ends of justice and the protection of the Constitutional rights of the Petitioner, the Interested Parties and the public at large in the context of the declarations made.

(vii) The costs of the Petition be awarded to the Petitioner.

3. At the same time, the Petitioner filed a Motion under a certificate of urgency seeking injunctive reliefs.

4. The Court granted the injunctive reliefs on 4 August 2020 and further directed the parties to file and exchange affidavits and submissions.

5. On 27 August 2020, the Respondents filed a Notice of Preliminary Objection contending:

(i) THAT this Court lacks jurisdiction to hear and determine this matter as the same ought to have been before the Public Service Commission in accordance with section 77 of the County Governments Act No. 17 of 2012.

(ii) THAT the Petitioner lacks the requisite *locus standi* to file this matter which is a matter of a private nature concerning the employment contract between the Respondents and her employees. The Petitioner is neither an employee of the Respondents nor does he have any authority from any of the employees of the Respondents to file this Petition on their behalf. This is not a public interest matter, and therefore the Petitioner is a busy body as none of the Respondents employees has filed any complaint in regard to the terms and conditions in respect of their employment contract with the Respondents.

6. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties filed replying affidavits in support of the Petition on 8 September 2020. The Petitioner filed his submissions on the same day.

7. Another Interested Party called David Juma Wamalwa also filed a replying affidavit on 8 September 2020.

8. When the Petition was placed before the Court on 17 December 2020, it directed that both the Motion and Petition be heard together. The Court also directed the parties to file and exchange affidavits and submissions.

9. Since the Respondents were absent, the Court directed the Petitioner to notify them of the directions.

10. It is not clear if the Petitioner notified the Respondents as directed by the Court since none of the Respondents filed any affidavits or submissions.

11. The Court will consider the preliminary objections first.

**Exhaustion of statutory dispute resolution mechanisms**

12. The Petitioner primarily challenged the terms and conditions of service under which the County Public Service Board, Bungoma, had contracted nurses.

13. Section 85 of the Public Service Commission Act is therefore implicated.

14. Section 85 of the Public Service Commission Act is in the following terms:

85. Appeal from County Government public service

The Commission shall, in order to discharge its mandate under Article 234(2)(i) of the Constitution, hear and determine appeals in respect of any decision relating to engagement of any person in a County Government, including a decision in respect of —

(a)...

(b) remuneration and terms and conditions of service;

15. Another applicable provision of the Act is section 87(2) of which provides that:

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 public service unless the procedure provided for under this Part has been exhausted.

16. In terms of section 87(2) of the Public Service Commission Act, the Petitioners and Interested Parties first port of call should have been to appeal to the Public Service Commission on the complaints regarding underpayments, unlawful terminations and terms and conditions of service of the nurses.

17. The Petitioner and the Interested Parties did not demonstrate that they had utilised the avenue provided by the aforesaid provision of law, and thus the Court finds that the Court was moved prematurely.

#### **Locus of Petitioner in private law dispute**

18. The gravamen of the dispute advanced by the Petitioner revolves around contractual issues between the Respondents and their employees. It was not suggested that the Interested Parties could not pursue their own contractual disputes.

19. This Court is aware, and the Petitioner ought to have been aware if he was genuinely bringing the proceedings on behalf of the nurses that the Kenya National Union of Nurses, which represents nurses in the country, sued the County Public Service Board (see Kisumu Cause No. 51 of 2020, *Kenya National Union of Nurses v County Public Service Board, Bungoma*).

20. The Union has raised similar issues in the said Cause to the ones advanced by the Petitioner herein. The Cause is still pending determination before the Court.

21. It is not lost to the Court that most of the complaints raised by the Petitioner constitute terms and conditions of service which are ordinarily the subject of mutual discussions by trade unions (where employees are organised) and the employer and become codified in a collective bargaining agreement.

22. The Court again finds that the Petition should fail on the ground of *locus standi* and privity of contract.

23. In this respect, the Court notes that some of the nurses on behalf of whom the Petitioner purported to act had their contracts expire/terminated.

24. Before concluding, the Court must observe that it continues to note a trend where multiple suits are instituted on the same subject matter by different persons under the guise of public interest litigation.

25. More often than not, the Respondents do not bring such information to the notice of the Court. It is regrettable.

26. In light of the above, the Court upholds the Notice of Preliminary Objection and dismisses the Petition with costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 7<sup>TH</sup> DAY OF APRIL 2021.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

Petitioner in person

For Respondents Annet Mumalasi & Co. Advocates

Court Assistant Chrispo Aura