



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 30 OF 2019

IN THE MATTER OF ARTICLES 22(1) & (2)(c), 50(1) AND 258(1) & (2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION AND VIOLATION OF THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE ENSHRINED IN ARTICLES 1(1), 2(1),(2) & (3), 3(1), 4(2), 10(2), 46, 47, 73, 75, 174, 175M 232(1)(d)(e) & (f) AND 259(1) & (3) OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 19, 20, 21, 24, 27, 28, 33, 35, 46, 47, 201 AND 260 OF THE CONSTITUTION

AND

IN THE MATTER OF THE ALLEGED VIOLATION OF SECTIONS 3, 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF THE ALLEGED VIOLATION OF SECTIONS 3, 4 AND 7(5) OF THE PUBLIC APPOINTMENTS (COUNTY ASSEMBLIES APPROVAL) ACT NO. 5 OF 2017

AND

IN THE MATTER OF THE OBLIGATION OF THE HOMA BAY COUNTY ASSEMBLY COMMITTEE TO REALISE RIGHTS AND FUNDAMENTAL FREEDOMS AND THE NEED FOR A TRANSPARENT EXERCISE OF THE POWERS VESTED ON THEM IN MAKING DECISIONS AFFECTING THE PEOPLE THEY REPRESENT

BETWEEN

MICHAEL KOJO OTIENO.....1st PETITIONER

EVANCE OTIENO OLOO GOR.....2nd PETITIONER

VERSUS

HOMA BAY COUNTY ASSEMBLY.....RESPONDENT

JUDGMENT

1. On January 26 2018, the County Public Service Board, Homa Bay (the Board), published the names of persons who had been shortlisted as Chief Officers.
2. The notice was followed by another one on September 17 2019, by the County Assembly of Homa Bay (the County Assembly) notifying the public of approval hearings of the 4 persons who had been nominated as Chief Officers.
3. The notice prompted Michael Kojo Otieno and Evance Otieno Oloo Gor (the Petitioners) to lodge a Petition with the Court alleging that the nominations violated the law because some of the shortlisted persons had not applied for the positions for which they were shortlisted.

4. The Petitioners sought the following orders:

i. A declaration that:

(a) The Respondent has violated express provisions of the law and statutes.

(b) The adverts made on Tuesday, September 17, 2019, is void (sic).

ii. An order:

(a) Ordering the Respondent to make a fresh advert as stipulated by law.

(b) Suspending the annulment (sic) in order (a) for a period of 30 days to allow the Respondent to comply with the Statutory Instruments Act as well as the Public Appointments (County Assemblies Approval) Act 2017 and the County Governments Act section 35(3)(d) in appointing the County Executive Committee member.

(c) Annuling the exercise in its entirety on the approval (sic) as per the advert.

(d) Compelling the Respondent to fairly and transparently carry the exercise strictly in accordance with the law.

(e) Any other relief the Court may deem fit and just.

5. On the same day, the Petitioners filed a Motion under a certificate of urgency seeking interim conservatory orders.

6. The Court certified the Motion as urgent and directed that it be served ahead of an *inter-partes* hearing.

7. Upon service, the County Assembly filed a Replying Affidavit sworn by the Clerk and a Notice of Preliminary Objection contending that:

i. The Respondent is not a legal person capable of being sued in her own name.

ii. The Petitioners/applicants are guilty of non-joinder of necessary parties to the suit.

iii. The application is misconceived, incompetent and premature for failure to adhere to the doctrine of exhaustion of remedies provided for under Section 77 of the County Governments Act, Section 85 to 89 of the Public Service Commission Act.

iv. The Court lacks jurisdiction to entertain this application as there is no employer-employee relationship between the Petitioners and the Respondent.

v. The application is brought under the wrong provisions of law.

8. When the parties appeared in Court on February 18 2020, the Court directed that the Motion and Preliminary Objection be taken together. The parties were ordered to file and exchange submissions within set timelines. The ruling was to be on notice.

9. The next time the file was placed before Court was on December 8 2020. The Petitioners were present, but the County Assembly was not represented.

10. It turned out that the County Assembly had not filed submissions on the Preliminary Objection, and the Court dismissed it.

11. The Court also directed that the Motion and the Petition would be taken together.

12. The parties were directed to file and exchange submissions.

13. The 1st Petitioner filed a further affidavit on December 16 2019 (no leave had been sought).

14. The Petitioners filed their submissions on January 5 2021, and they identified the Issues for determination as:

i. Whether the Court has jurisdiction?

ii. Whether the Respondent has threatened or violated the Constitution?

iii. Whether the exercise of approval of Chief Officers complied with the Public Appointments (County Assemblies Approval) Act of 2017 as well as the County Governments Act, 2012?

iv. Whether the Respondent violated the Petitioners legitimate expectations?

v. Whether costs are payable?

15. On January 13 2021, the County Assembly filed a Motion seeking the setting aside of the orders dismissing the Preliminary Objection.

16. When the Motion came up for directions on February 10 2021, the advocate for the County Assembly informed the Court that it had filed submissions on both the Preliminary Objection and the Petition.

17. The Court has given due consideration to all the material placed before it.

Jurisdiction

18. The Court had dismissed the Preliminary Objection by the County Assembly on 8 December 2020, without hearing submissions from the parties. Since the objection challenged the Court's jurisdiction and jurisdiction is foundational, the Court was under an obligation to consider because the parties had now submitted on it.

19. The County Assembly challenged the jurisdiction of the Court on the ground that the Petitioners had moved the Court before the exhaustion of the dispute resolution mechanisms set out in section 77 of the County Governments Act as read with sections 85, 86, 87, 88 and 89 of the Public Service Commission Act.

20. Section 77 of the County Governments Act provides: Appeals to the Public Service Commission

(1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the "Commission") against the decision.

(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;**

(b) remuneration and terms and conditions of service;

(c) disciplinary control;

(d) national values and principles of governance, under Article 10, and values and principles of public service under Article 232 of the Constitution;

(e) retirement and other removal from service;

(f) pension benefits, gratuity and any other terminal benefits; or

(g) any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.

(3) An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.

(4) The Commission shall not entertain an appeal more than once in respect to the same decision.

(5) Any person dissatisfied or affected by a decision made by the Commission on appeal in a decision made in a disciplinary case may apply for review, and the Commission may admit the application if—

(a) the Commission is satisfied that there appear in the application new and material facts which might have affected its earlier decision, and if adequate reasons for the non-disclosure of such facts at an earlier date are given; or

(b) there is an error apparent on record of either decision.

(6) An application for review under subsection (5) shall be in writing and made within the time prescribed by the Commission in regulations governing disciplinary proceedings, but the commission may entertain an application for review later if, in the opinion of the Commission, the circumstances warrant it

21. On the other hand, section 87(2) of the Public Service Commission Act 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.

22. The Petitioners were challenging a recruitment and appointment process of Chief Officers. The function is primarily for the Board, and the County Assembly approves the nominees.

23. The above-cited statutory provisions and more particularly section 77(2)(a) of the County Governments Act leave no doubt in the mind of the Court that the first port of call for a person challenging the *recruitment, selection and appointment* made by a County Public Service Board is through an appeal to the Public Service Commission of Kenya (the Petitioners had the option of raising their concerns with the County Assembly as it is also bound to uphold and promote the values and principles of the Constitution).

24. The approach of exhausting statutorily ordained dispute resolution mechanisms was endorsed by the Court of Appeal in *Secretary, County Public Service Board & Ar v Hulbhai Gedi Abdille* (2017) eKLR wherein the Court stated:

There is no doubt that the Respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by section 77 of the Act. The section provides not only a forum through which the Respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialised one, specifically tailored by the legislators to meet the needs such as the Respondent. In our view, the most suitable and appropriate recourse for the Respondent was to invoke the appellate procedure under the Act than resort to the judicial process in the first instance.

25. The decision by the Court of Appeal binds this Court.

26. The Court will, in light of the above, decline jurisdiction.

Joinder

27. The County Assembly did not generate by itself the names of the nominees. The nominees were the product of a process conducted by the County Public Service Board.

28. The Board was, therefore, a necessary party to the litigation, and by failing to join it, the Court would have declined to grant the orders sought.

29. The Court is of the further view that the 4 persons who had been nominated should have been joined to the proceedings as the orders sought by the Petitioners had the potential to adversely affect them.

The capacity of the Respondent to be sued

30. The County Assembly urged that it had no capacity to be sued because it is not a legal person.

32. The Court finds the objection not determinative for Article 258 defines a person to include a body of persons, incorporated or unincorporated. A County Assembly is recognised at the first instance in Article 176 of the Constitution.

Conclusion and Orders

32. From the above, the Court declines jurisdiction, and the Petition is dismissed.

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

Delivered through Microsoft teams, dated and signed in Kisumu on this 19th day of May 2021.

Radido Stephen, MCI Arb

Judge

Appearances

Petitioners in person

For Respondent Wendy Opar, Advocate, Legal Officer, County Assembly of Homa Bay

Court Assistant Chrispo Aura