



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**PETITION NO.22 OF 2020**

*(Before D.K.N.Marete)*

ALI JARSO WAKO.....1ST PETITIONER

BORANA ELDERS FROM HEILU LOCATION.....2ND PETITIONER

VERSUS

PRINCIPAL SECRETARY MINISTRY OF INTERIOR &  
COORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT

REGIONAL COMMISSIONER, EASTERN REGION.....2ND RESPONDENT

COUNTY COMMISSIONER, MARSABIT.....3RD RESPONDENT

DEPUTY COUNTY COMMISSIONER

MOYALE SUB-COUNTY.....4TH RESPONDENT

MOHAMUD MOHAMED GODANA.....5TH RESPONDENT

THE ATTORNEY GENERAL.....6TH RESPONDENT

THE PUBLIC SERVICE COMMISSION.....1ST INTERESTED PARTY

MOHAMED HAPICHA.....2ND INTERESTED PARTY

HASSAN ADAN.....3RD INTERESTED PARTY

HON.KHADIJA IBRAHIM.....4TH INTERESTED PARTY

ISSACKO GALGALLO.....5TH INTERESTED PARTY

EDDIN GABABO.....6TH INTERESTED PARTY

**JUDGMENT**

This is a combined Petition and Application brought to court via an affidavit sworn on 10th July, 2020.

The 5th Respondent in a Replying Affidavit sworn on 20th July, 2020 deny the petition and application and pray that the same be dismissed with costs.

The 2nd to 6th Interested Parties in a Supporting Affidavit sworn on 29th July, 2020 deny the petition and application and pray that the same be dismissed with costs.

The 1st to 4th and 6th Respondents did not file any reply. They chose to associate with the case of the 5th Respondent and Interested Parties.

The petitioner's case is that on 5th December, 2019 the Deputy Commissioner, Moyale Sub-County advertised for the position of Chief Grade II, Heilu Location.

The petitioner's other case is that many persons responded to the advertisement out of which 5 applicants were interviewed and he emerged top of the list. However, since February, 2020 the position has not been filled due to political interference.

The petitioner's other case is that the member of parliament, Moyale Constituency wrote to the 1st respondent clearly explaining the underlying issues hindering his appointment after he emerged position one from the interview.

The petitioner's further case is that out of scheme of things and in total disregard of the principal of fairness the 1st respondent has gone ahead to recommend the 5th respondent for appointment despite him emerging 2nd out of the five (5) applicants who were interviewed by the 4th respondent. This recommendation goes against the general principles of community fair representation within Heilu Manyatta Ward in regard to the ethnic distribution set up within the Ward.

It is the petitioner's further case that the chosen candidate is not qualified and fails on the first limb by not being a resident of Heilu but Nairobi with no local connection whatsoever. This is exhibited in the postal address of his letter of application which also does not indicate his involvement in any community activities or development and is only a display of his working for various private companies.

The petitioner's other case is that the appointment of the 5th respondent constitutes an abuse of administrative authority and discretion besides being a violation of the legal process. The doctrine of necessity compels estoppel of illegal recruitment to ensure prevalence of sanity and peace.

The petitioner's penultimate case is as follows;

- That the recruitment process is rushed, malicious and intended to irreparably violate the petitioner's fundamental rights as guaranteed by the constitution and therefore calls for the courts intervention.
- The actions of the 1st, 2nd, 3rd and 4th respondents constitutes and display bad faith and an abuse of discretion and powers.

The 2nd petitioner's case associates with that of the 1st petitioner.

It is their case that the appointment of the 5th respondent as chief, Heilu location constitutes an abuse of the legal process, administrative authority and discretion as indeed, it was the 1st petitioner who emerged top during the recruitment process and was endorsed by the 3rd and 4th respondents.

It is their further case that the renewed results, a change of interview results is a shocker as these results are in the public domain. This occurrence goes out to erode community trust and confidence in government.

Again, Heilu- Manyata ward is a conflict hot point and people have been resettled after many years of conflicts. The local leadership has always comprised of four chiefs from the Gabra, four from Burji and one from the Borana community. This is despite the Borana community being the majority. This denial of equitable and proportionate number of chiefs to the Borana community is against the spirit of ethnic balance in local governance, community cohesion, peace building and reconciliation.

It is the 2nd petitioner's case that this issue is not a Moyale constituency issue but one relating to Heilu ward where the Gabra community has been awarded a chiefs position that has traditional been held by the Borana community. This has brought tension as the Borana are not represented in the appointments of chiefs and assistant-chiefs in the Ward.

It comprises skilled distribution of positions against the Borana community in the ward and unless the court intervenes there shall be a recruitment process that is rushed, malicious and intended to irreparably violate the petitioner's fundamental rights and freedoms guaranteed under the Constitution.

The 1st to 4th and 6th respondents did not reply to the petition. They chose to associate with the cases of the 5th Respondent and Interested Parties. This court has no issue with this. It is onus of the parties to prosecute their cases the best way known to them.

The 5th Respondent's case is that the applicant has concealed material facts before court. He is guilty of misapprehension of facts or giving misleading facts to court. Overall, he has not approached the court with clean hands and has acted in bad faith.

It is 5th Respondent further case that this petition and application lacks merit and is material for dismissal with costs.

The 5th Respondent's other case is that the petitioner/Applicants have not set out with a reasonable degree of precision what they are complaining about. This is the provision alleged to be infringed and the manner of such infringements as provided for in the authority of **Anarita Karimi Njeru v Republic**.

The 5th Respondent's further case is as follows;

- That the allegations contained are in general terms.

- The petition and application does not allege breach or violation of specific constitutional provisions or infringement of specific rights and fundamental freedom, inclusive of the manner of such breach.
- The petition is frivolous and an abuse of the process of court.
- The petition and application is anchored on the grievances against the public service commission who is not a party to the suit.
- That the affidavit in support of motion comprises of half-truths and falsehoods and is a concealment of the material facts.
- The concealment of material facts comprises of;

*i) The interviews for the post of chief Heilu location, recruitment process and appointment of the chief were done in hand with advertisement, recruitment and appointment for Assistant chief post for Heilu sub-location.*

*ii) That the position of Assistant Chief of Heilu sub-location, Heilu location was given to a candidate from the Borana Community.*

*iii) That the successful candidate interviewed and appointed by the same panel herein is ABDISATAR ABDI IBRAHIM.*

*iv) That the said appointee is a brother to the listed 3<sup>rd</sup> named person for the 2<sup>nd</sup> petitioner/Applicant in the exhibit marked "AMGO-1" by the 2<sup>nd</sup> Petitioner/Applicant, namely ABDISHAKUR ABDI IBRAHIM.*

*v) That the said 3<sup>rd</sup> names individual of the 2<sup>nd</sup> petitioner/Applicant, namely ABDISHAKUR ABDI IBRAHIM is a former nominated Councillor from Heilu location for the year 2002-2007.*

*vi) It is therefore abundantly clear that the Petitioners/Applicants have failed to make a frank and candid disclosure that as a community they have been given the post of Assistant chief in the same area by the same panel and that the said appointed Chief is a brother to one of the named persons to the 2<sup>nd</sup> petitioner.*

Further, the Petitioners' are aware that;

*i) Heilu location has never had a chief from any other community since independence other than Borana.*

*ii) The 1<sup>st</sup> named individual in the list of the 2<sup>nd</sup> Petitioner, ADAN MOHAMMED GALGALO is the immediate retired chief for Heilu location, having served for over 20 years and therefore conversant with the representation of administrative posts in this area.*

*iii) ABDISAKUR ABDI IBRAHIM is a former nominated councillor from Heilu location and a brother to the newly appointed assistant chief ABDISAKUR ABDI IBRAHIM for Heilu Sub-location Heilu location. He is equally knowledgeable about the distribution of Administrative positions within Moyale Sub-County.*

*iv) The other named individuals for the 2<sup>nd</sup> petitioner/Applicant are elders of Borana community elderly and deemed to know the community representation in Moyale sub-county as a whole and have hence suppressed relevant information known them.*

*v) The 1<sup>st</sup> Petitioner/Applicant hails from Moyale sub-county and is equally deemed to know the said information and if not ought to have made inquiries prior to the filing of this petition.*

The Respondent's further case is that he is qualified for this position and he sat for his KCSE examination at Moyale Boys Secondary School in 2001 and scored a C plain. He also was born and grew up in the locality and therefore the allegations of such non qualification do not arise.

He, in the penultimate presents a case of a parochial and nepotic case of the petitioners and denies it *in toto*.

The 6th Interested party's case is representative of all the interested parties.

It is their further case that they intended to support the 5th Respondent case in defence of the petition.

The 6th interested party's further case is that he is the current Chairman of the Gabra councillor of elders, Moyale sub-county, Marsabit county. He was born and brought up in Heilu location and is a former elected councillor of Heilu ward having served all the way upto the year 2007.

All the interested parties are respected members and leaders of the Gabra community and vouch for the qualifications of the 5th Respondent for the position of chief. He had acquired a C plain and not a D as alleged, in KCSE.

It is their other case that the 5th Respondent scored the highest mark on competence and was ranked to second and that the constitutional criteria for recruitments absorbs any candidate ranked number 1 to 3.

The Interested Party's case is a denial of the allegations of marginalization of the Borana Community by the administration and aver that indeed, the Borana are majoritarian in such representation to the disadvantage of other communities including their Gabra.

The issues for determination therefore are;

1. Whether there was a violation of the rights of the Petitioners in the recruitment process of chiefs, Heilu location by the Respondents.
2. Whether the petitioners are entitled to the relief sought.
3. Who bears the costs of this cause?

The 1st issue for determination is whether there was a violation of the rights of the Petitioners in the recruitment process of chief, Heilu location by the Respondents. The Petitioners' in their written submissions dated 4th February, 2021 reiterates their case and submit a case of violation of Article 47 of the Constitution of Kenya, 2010 as read with the Fair Administrative Action Act for reason that the recruitments exercise and process was conducted in bad faith, bias and procedural unfairness to the Petitioners.

This is for reasons that the appointee is not a resident of the Heilu location but Nairobi and has no links with the local community whatsoever.

Further, the Petitioners submits that the recruitment process was rushed and malicious and intended to violate the Petitioners' rights and freedoms under the constitution in its intent and purposes. The 1st, 2nd and 3rd Respondents display bad faith and abuse of discretion in appointing the candidate who was rated second in the interview results.

Again, their actions are a display of failure to take relevant considerations, irrationality, unreasonableness and error of law. This is in addition to;

- Failure of the 1st to 4th Respondents from equipping themselves with information necessary to make informed relations.
- Acting on exaggerated and misleading facts in this critical decision making exercise.
- Acting in abuse of discretion and power, disproportionate action, vexation and illegality in decision making.

The Petitioners in conclusion submit a case of discrimination and violation of Article 27 (1) (2) and (3) of the constitution for the following reasons;

- i) The Respondents each and all have denied or threatened to deny the petitioners the right to equality before the law and the right to equal protection and equal benefit of the law in that arbitrary action has been taken against him or threatened to be taken against without the determination of the veracity and justification of the false information and accusations made against the Petitioner.*
- ii) The Respondents each and all have discriminated directly or indirectly against the petitioners on account of the petitioner's conscience and belief.*

They also submit a case of an affront to the human dignity contrary to Article 19 of the constitution.

The Respondents and 1st Interested Party reiterates their case in totality and submits compliance with Articles 73 and 232 (g) of the Constitution of Kenya, 2010 which provides that selection should be based on personal integrity, competence and suitability.

They further submits compliance with Article 47 as read with section 4 (3) of the Fair Administrative Action Act which mandates the administrator to take administrative decisions in a lawful, effective and efficient manner especially where the decision is likely to affect the rights and freedoms of persons like in this case.

The Respondents and 1st Interested Party deny the petitioners case and submit that it is not proven or at all. On this International Labour Organisation Discrimination (Employment and Occupation) Convention, 1958 (No.III) under which discrimination is defined as follows;

*“For the purpose of this convention the term discrimination includes;*

- 1. any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;*
- 2. such other distinction exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the member concerned after consultation with representative employers' and workers' organisations where such exist, and with other appropriate bodies”.*

They further buttress their case by relying on the authority of **Stephen Somek Takwenyi & Another vs David Mbuthia Githare & 2 others Nairobi (Milimani) HCCC No.363 of 2009**, Kimaru, J stated with respect to the court's power to prevent abuse of its process as

follows;

*“This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilized legal process it is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it.”*

The 2nd to 6th Interested Parties in their written submissions dated 1st March, 2021 also reiterate their case and submit non-compliance with the authority of **Anarita Karimi Njeru v Republic** it does not specify all particularise the violations or even means of violations of the rights of the Petitioners as enshrined in the constitution.

Their other case and submission is that all through, the petitioners have not demonstrated their case in evidence of a balance of probabilities. It therefore fails *in toto*.

This is a convoluted matter and situation. The parties come up with allegations which are equally countered by their opponents. The petitioners bring out a case of violation of their rights taking into account that the candidates selected and appointed to the position of chief was not ranked top during the interviews.

The Petitioners other submissions is that the selection of chief is discriminative in that it marginalises their Borana community who have not been awarded a proportionate opportunity in leadership of the ward.

Again, the petitioners submit that this marginalization has led to a volatile situation where inter clan rivalry and hostility continue to threaten peace in the community. There is therefore need to address the various issues raised by individual communities in the running of the mutual affairs and government to instil peace and well being.

The petitioner’s case founders on the lack of qualification of the selected candidate for chief. This is vehemently denied by the respondents and all interested parties. It is their case that the exercise was lawful and constitutional in all aspects. It was proper and good. The petitioner’s complaints are therefore wild goose chasing and sour grapes.

To me, the petitioner’s case takes the day. This is because, despite the hullabaloo of the cases of the parties this situation spells out a delicate and volatile situation which required extremely cautious handling during the exercise of selection of chief, Heilu Location. The views and feelings of all interested parties should have been had, sought and considered in the selection. Public participation was key and critical in the exercise.

The Petitioner’s come out clear on their allegations and evidence in support of such allegations and case. The Respondents have not come clean in adducing evidence to counter their allegations of *inter alia* non qualification, domicile and participation of the appointee in the affairs of the local community. This is despite concerted efforts on the part of the 2nd to 6th Interested parties to lodge this in support of the appointment.

The defence of lack of particulars and the Anarita Karimi Njeru authority does not offer support to the respondents case. This is because the petitioners have elucidated and spelt out their case in the petition. It is not expected that there is a set format for making a case of constitutional breach. Any such requirement or expectation would go out of its way in curtailing the enjoyment of fundamental rights and freedoms as spelt out in the constitution.

The matter does not come out clean. It is an issue of your word against mine. In this kind of scenario, the applicable test is that of a balance of probabilities. What is the likely circumstance in the matter? Here, I tilt the balance in favour of the Petitioners. This is because, on a question of qualifications and conduct of interviews like we have, the respondent should have come out to demonstrate compliance with the letter and spirit of the law and constitution. Openness was key to this process.

The Respondents were in a better position to display evidence on the process and proceedings of the interview process and results. They did not. This is despite their clear knowledge of the volatile situation on the ground and the consequences of any mishap in the exercise. They ought to have known the implications of taking the second position candidate for appointment to office.

I am therefore inclined to allow the claim and order relief as follows;

- i) A Declaration be and is hereby issued that the recruitment of the 5th Respondent as chief, Heilu location is illegal, procedurally unfair and unconstitutional.
- ii) That it in the interest of good governance and entrenchment of peace, the recruitment exercise of chief, Heilu location be repeated with a view to taking into the account the law and constitution and particularly that on involvement of all stake holders and effective public participation by all.

iii) That the costs of this petition shall be borne by the Respondents.

**DATED AND DELIVERED AT NYERI THIS 26TH DAY OF JULY, 2021.**

**D.K.NJAGI MARETE**

**JUDGE**

Appearances

1. Mr.Kiogora Mugambi instructed by Kiogora Mugambi & Company Advocates for the Petitioners.
2. Miss Kungu instructed by State Law Office for the Respondents and 1st Interested Party.
3. Mr.Nyandieka instructed by Nyandieka & Associates Advocates for the 2nd to 6th Interested Parties.