



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

PETITION NO.9 OF 2020

(Before D.K.N.Marete)

KIPATIA LEKARKAR.....1ST PETITIONER
SAMSON LEKASHIRA.....2ND PETITIONER
MEKWETI LENGAPIANI.....3RD PETITIONER
DECEMBER LENA KULA.....4TH PETITIONER
NICHOLAS MULI.....5TH PETITIONER
NISA LEKASHIRA.....6TH PETITIONER
NKOITIEMU LENA KULA.....7TH PETITIONER
RAITA LEKIPUKEI.....8TH PETITIONER
JOSPHAT LEKASOE.....9TH PETITIONER
MURUNTOI LENDOO.....10TH PETITIONER

VERSUS

**THE DEPUTY COUNTY COMMISSIONER,
SAMBURU CENTRAL SUN-COUNTY.....RESPONDENT
PHILIP LE PARSULAN.....1ST INTERESTED PARTY
PHILIP LEBENEYO.....2ND INTERESTED PARTY
PHILIP OLEKIREU.....3RD INTERESTED PARTY
CAROLINE CHEMTAI KORIR.....4TH INTERESTED PARTY
PETER BOOLA LETEROI.....5TH INTERESTED PARTY
SAIDIMU LEMIRANIT.....6TH INTERESTED PARTY**

JUDGMENT

This matter was originated by way of an Amended Petition amended on 21st September, 2020.

The Respondent in a Replying Affidavit sworn on 24th July, 2020 denies the issues raised in the petition and prays that this be dismissed

with costs.

The Petitioners case is that Articles 3 as read with Articles 22 (1) , 23 and 255 of the Constitution of Kenya, 2010 enables them to petition this court for enforcement of their and on other persons rights that are violated or are under threat of such violation. This is as follows;

5. *Your Petitioners aver further that this Honourable Court is clothes with requisite jurisdiction under Articles 162(2), 41 as read together with Article 159 Constitution of Kenya 2010 to hear and determine any question regarding violation of rights, determine constitutionality of any act or omission as well as interpret the Constitution in respect to the violation of the right to fair labour practices under Article 41 of the Constitution of Kenya, 2010.*

6. *That your Petitioners aver that this Honourable court's constitutional mandate aforesaid, is exercised by issuing such orders and writs as it deems just and fit to state organs and or any person to act within the law and fulfil its constitutional obligations.*

The petitioners' case is as follows;

7. *The Petitioners aver on 18th March, 2020 the Respondent conducted and/or interviewed the Interested Parties herein for the position of the chief for Amaiya Location Lorroki Division within Samburu County following the Advertisement of vacancy for the said position through a letter dated 13th December, 2019 referenced as OOP/SBU/CEN/ST.1/3/VOLIX/20.*

8. *THE Petitioners aver that the said the Interested Parties applications for the said position were considered unprocedurally, secretly and the process was marred by discrimination and favouritism in total disregard of the Constitution of Kenya, 2010 and in particular Article 27.*

8A. The Petitioners aver that through the Replying Affidavit of the Respondent and the Annexure marked as MMM-8 being a letter dated 5th June, 2020 it has become apparent that the Respondent has purportedly appointed the 1st Interested Party as the Chief Amaiya Location pending verification or authentication academic qualification from Kenya Nation Examination Council (KNEC) notwithstanding that he does not hold and/or possess academic qualifications and other requirements set out in the job advertisement contained in the letter dated 13th December, 2019 referenced as OOP/SBU/CEN/ST.1/3/VOLIX/20.

9. *The Petitioner aver that the said shortlisting and subsequent interviews were done in an opaque manner, devoid of transparency, public participation and in total breach of the Constitution of Kenya, 2010 and in particular Articles 10, 41, 47 and 232 which dictate that the appointments to public offices must be done through a competitive process, transparent, consultative and participatory among others, further Article 47 requires administrative action to be expedite, fair and reasonable which principles the Respondent failed to adhere and thus should the said process be allowed to culminate in an appointment of the Chief of Amaiya Location on the basis of the impugned interviews the residents of Amaiya location will suffer substantial loss and damage on the account of poor leadership devoid of the required qualification and more importantly integrity within the terms of Chapter 6 of the Constitution of Kenya, 2010.*

9A. The Petitioners avers that the appointment of the 1st Interested Party was as a result of illegal, discriminatory, unprocedurally, unfair and uncompetitive interview process contrary to Articles 10, 27, 41, 47 and 232 of the Constitution of Kenya, 2010 and therefore impugned appointment of the 1st Interested party should not be allowed to stand otherwise the Petitioners and members of Amaiya location and that of the petitioners will suffer substantial loss and damage on the account that the 1st Interested Party is unqualified, unsuitable and unfit to hold the position of Chief Amaiya Location

They pray as follows;

1. *A declaration that the recruitment, shortlisting and interviews of the Interested Parties conducted on 18th March, 2020 in relation to the appointment for the position of a chief for Amaiya location was without regard to due process of law, was unlawful, illegal, null and void.*

1A. *A declaration that the 1st interested Party does not meet the required constitutional and statutory requirements, standards, qualifications and experience to be appointed to the position of the Chief for Amaiya Location (Chief II) and thus he is unqualified, unsuitable and unfit to serve as the Chief for Amaiya Location (Chief II).*

1B. *A declaration that the purported appointment of the 1st Interested Party to the position of the Chief for Amaiya Location (Chief II) vide a letter dated 5th June, 2020 did not meet the laid down substantive and procedural constitutional requirements applicable in public service appointments; and is therefore unconstitutional, unlawful, irregular, null and void for being in contravention of Articles 10, 27, 35 and 232 of the Constitution of Kenya, 2010.*

2. *An order of certiorari to issue removing into the Honourable Court the decision of the Respondent recruiting, shortlisting and interviewing the Interested Parties in relation to the appointment for the position of a chief for Amaiya Location and the same be quashed.*

2A. *An order quashing the purported appointment of the 1st Interested Party vide a letter dated 5th June, 2020 as the Chief for Amaiya Location (Chief II)*

3. *A declaration be issued that the petitioners enjoyment of their rights and fundamental freedoms secured in the Bill of Rights under Articles 10, 27, 35, 41, 47 and 232 of the Constitution of Kenya, 2010 have been threatened and infringed or are threatened by the*

Respondent by failing, neglecting and refusing to give the petitioner a hearing before the adverse administrative action and further in denying the petitioners access to information in relation to the Interested Parties application for the position of a chief II Amaiya location within Samburu County.

4. An order of a permanent injunction do issue restraining the Respondent jointly and severally, either acting on their own and or through its agents, employees, servants, and/or any other person acting and/or purporting to act under their instructions and or orders from appointing any of the Interested Parties and/or any other persons to the position of Chief Amaiya location and/or taking any further action in respect to filing the position of the Chief II Amaiya Location.

5. The court do find that the petitioners are entitled damages for violation of constitutional rights.

6. The Respondents be condemned to pay the Petitioners the costs of the Petition.

The Respondents case is that there arose a vacancy for the chief Amaiya Location, Lorroki Division within Samburu County and advertisement was undertaken to fill the positions.

The Respondents further case is that following the said advertisements, the sub-county Human Resource Officer shortlisted six (6) candidates to undergo interviews for the vacant positions. A meeting was held by the interviewing panel who fixed the interview dates as 18th March, 2020 in the office Boardroom. All candidates were invited for the interview which was to be conducted by the Human Resource Committee.

The Respondents further case is that prior to my advertising the vacancy of the position of Chief Amaiya Location within Samburu County, I had received a communication from the Principal Secretary Ministry of interior giving directions on how the process of recruitment would be carried out and clearly stating on the candidates that would be given first priority during recruitment. (Annexed and marked MMM6 is a copy of the said communication sent by the County Commissioner-Samburu County dated 25/6/19.

The Respondents other case is that on the date of the interview, the interviewing panel as scheduled and adopted a marking scheme to gauge the candidate with an award of marks for each. The most qualified candidate was therefore chosen and selected as chief.

The Respondents other case is that the appointment of the successful candidate for chief was subsequently approved by the Regional Commander, Rift Valley vide a letter dated 6th June, 2020.

It is the Respondents further case that, contrary to the allegations of appellants the exercise of recruitment was transparent as would probably would have been and complied with the laid down procedures.

Their other case is that if the petitioners had any contentions about the said recruitment nothing would have prevented them from displaying their capacities through an application for the position.

Their further case is as follows;

12. That I am a public officer appointed by the president of the Republic of Kenya pursuant to the National Government and Coordination Act 2013 and hence as provided for under section 15(b) as read together with section 16 of the above stated Act, I had not only the power to competitively recruit a chief for Amaiya location but can also not be held personally liable for any acts done during the performance of my official duties.

13. That indeed since the vacancy for the position of Amaiya location within Samburu County arose; the successful candidate herein has been the acting chief for that specific location by virtue of experience and good workmanship that even his seniors have taken note of.

The Respondents further case is reflected in a further affidavit sworn on 11th December, 2020 and comes out as follows;

- That the petitioners are members of one family and are seeking to advance their personally gains at the expense of the people of Amaiya location.
- That the petitioners seem to be having a personal grudge with the 1st Interested Party and are thus hellbent on having him loose the position of chief, Amaiya location.
- That the petitioners are fighting to install a chief from their clan, called The Masaai clan at the expense of a person who has served for 18 years as chief, Amaiya Location.
- That the 1st Interested Party has served as acting chief for Suguta location from 2009 to 2015 and as proved his competency to run a location as chief.
- The 1st interested party has already been confirmed as chief Amaiya Location and has been issued a letter of appointment to that extent.
- The 1st Respondent is on the payroll and therefore this petition is overtaken by events.

The issues for determination therefore are;

1. Whether the 1st Interested Party was qualified for appointment as chief, Amaiya Location?
2. Whether the recruitment process for the appointment of the 1st interested party was discriminatory and flawed?
3. Whether the petitioners are entitled to damages for violation of their constitutional rights?
4. Who bears the costs of this cause?

The 1st issue for determination is whether the 1st Interested Party was qualified for appointment as chief, Amaiya Location. The petitioners in their written submissions dated 18th February, 2021 reiterates their case and submit a case of no qualifications for appointments of the 1st Interested Party as chief, Amaiya Location.

It is their case that from the onset, the 1st Interested Party did not have the mandatory requirements of Grade c+ or its equivalent with a mean grade of c+ or its equivalent both English and Kiswahili. These, *inter alia*, were the requirements of the advertisements and the appointee did not meet them. He was therefore unqualified from day one.

The Petitioners further submits that the recruitment process was flawed and unlawful for contravening the provisions of Constitution of Kenya, 2010. This is as follows;

3.0. ... *it is clear from the issues raised by the petitioners' Amended Petition that the recruitment process was flawed and unlawful. It is a requirement of the law that any appointment of public officer must adhere to the values set out in Articles 10 and 232 and must take into account the provisions of Chapter Six of the Constitution, 2010 and in particular Article 73(2). In addition, section 10 of the Public Service (Values and principles) Act requires that public appointments and promotions be on the basis of the fair competition and merit. The section provides;*

“(1) the public service, a public institution or an authorised officer shall ensure that public officers are appointed and promoted on basis of fair competition and merit.

(2) Despite subsection (1), the public service may appoint or promote public officers without undue reliance on fair competition or merit if-

- a) a community in Kenya is not adequately represented in appointments to or promotions in the public service or in a public institution ;*
- b) the balance of gender in the public service or in a public institution is biased towards one gender;*
- c) an ethnic group is disproportionately represented in the public service or in a public institution; or*
- d) persons with disabilities are not adequately represented in the public service or in a public institution.*

(3) Each public institution or each authorised officer shall develop a system for the provision of relevant information that promotes fairness and merit in appointments and promotions.”

3.4 further, your Lordship, the Court of Appeal in *Ferdinand Ndung'u Waititu v Benson Riitho Mureithi (suing on his behalf and on behalf of the general public) & 2 others (2018) eKLR* held:

“The application of Chapter Six of the Constitution to public officers, places an obligation on the appointing authority to take into account the integrity of the persons being considered for appointment as a public officer. In particular, Article 73(2) of the Constitution, provides the guiding principles of leadership and integrity, which includes...The above constitutional provision places an obligation on any appointing authority in regard to the appointment of a State Officer to inquire into the personal integrity, competence and suitability of the appointee. The requirement of accountability to the public places the spotlight on the process and provides for public participation. Therefore, the issue of consideration of integrity and competence of the appellant was a crucial process in his appointment as Chairman of the Athi Water Services Board, and a matter of public interest.”

The Respondents relies on the provision of Article 234 of the Constitution of Kenya, 2010 as espoused under section 36 of the Public Service Commission Act which provides as follows;

- (1) In selecting candidates for appointment or promotions, the Commission or other lawful appointing authority shall have regard to*
 - a) merit, equity, aptitude and suitability;*
 - b) the prescribed qualifications for holding in the office;*
 - c) the efficiency of the public service;*

d) the provable experience and demonstrable milestones attained by the candidate; and

e) the personal integrity of the candidate.

(2) For the purposes of this section, “merit” in regard to a person means, the person-

a) Has the abilities, aptitude, skills, qualifications, knowledge, experience and personal qualities relevant to the carrying out of the duties in question;

b) Has potential for development; and

c) Meets the criteria set out in subsection (1).

She further seeks to rely on the authority of Ex Chief **Peter Odoyo Ogada & Others v Independent Electoral and Boundaries Commission & others, Civil Appeal No.307 of 2012** where the Court of Appeal observed thus;

“A body or organ performing statutory duties has discretion when handling matters falling within its mandate. There is a margin of discretion conferred by the Constitution and the law upon those who make decisions and the test of rationality ensured that any legislation or official act is confined within the purposes set by law. It is the insistence that decisions must be rational that limits arbitrariness and not discretion by itself. Where a body like IEBC applied its mind to constitutional requirements, reaching a rational conclusion, the courts should not review that decision.”

This court acknowledges the respondents case and submissions that she exercised her discretion and in the best interest of the case appointed the 1st Interested Party to the position of Chief, Amaiya Location. What the respondent does not address, however, is the petitioner’s protest on the salient ingredients of the advertisement for the position which were not met by the 1st interested party or any of the shortlisted candidates for the interview.

It is the petitioner’s case and submission that the 1st Interested Party and other candidates for the interview were largely not qualified in accordance with the advert for the interview. All interventions by the petitioners on the matter fell on deaf ears. These were not addressed by the respondents.

The process of recruitments of chief, Amaiya location was not inclusive and was lacking in public participation. It was a closed in house affair that was opaque and flawed. It lacked the transparency envisaged by Article 10, 73, 234 and 236 of the Constitution of Kenya, 2010 relating *inter alia* responsibilities of leadership and functions and power of the Public Service Commission.

The criteria for appointments to this office was as follows;

a) Have served for at least six (6) years in the public service and shown leadership and administrative qualities;

b) Be in possession of K.C.S.E grade C+ or its equivalent with C+ in both English and Kiswahili.

c) Be in possession of Diploma in Public Administration/Management, social work/ community development, teaching, Disaster management or equivalent qualification from a recognised institution.

d) Be thirty five (35) years old and above (not more than 45 for non civil servant)

e) Is a resident of the location and a person of integrity who commands;

f) Commands good communication skills

g) Have been involved in development projects in their particular areas.

This court believes that this was a concerted and well thought out scheme by the respondent in the selection and appointments to the position of Chief, Amaiya location. Therefore, the provisions of decency and discretion of the respondent as espoused in law and constitution must be pegged on this. It is the cornerstone of the entire exercise. It is the parameter from which we are able to gauge its efficacy.

The petitioners case and submissions is that this criterion was never met or addressed. The respondent does not address this but moves on to bring out other underlying circumstances which led to the appointment of chief, Amaiya location after the conduct of the interviews. The respondent refuses to address this public concern.

Again, the respondent, if she found difficulty in acquiring appropriate candidature for the position per the terms of the advertisements could have changed course midway, or as appropriate. She could have caused a re-advertisement to cater for the changed circumstances and accommodate the local situation as need dictated. This was not done. This is the fallacy of the situation and exercise.

I must find that this is not acceptable. It goes against the grain of the requirements for the position and from the onset imbues lack of constitutionality in the process. The petition therefore takes the day.

I am therefore inclined to allow the petition with costs to the petitioners.

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

D.K.NJAGI MARETE

JUDGE

Appearances

- 1.Mr.Lesaigor instructed by Hashim & Lesaigor & Associates Advocates to the Petitioners.
2. Mr.Muthuri instructed by State Law Office for the Respondent.