



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

PETITION NO. E001 OF 2020

LEONARD SIGEI ARAP BETT.....PETITIONER

-VERSUS-

THE GOVERNOR, BOMET COUNTY.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF BOMET.....2ND RESPONDENT

BOMET COUNTY PUBLIC SERVICE BOARD.....3RD RESPONDENT

AND

THE SALARIES AND REMUNERATION COMMISSION.....I.PARTY

RULING

1. This ruling is in respect of the Petitioner/Applicant’s application dated 30th September, 2020 filed under certificate of urgency pursuant to Articles 159(2)(e),165(3) (d) (iii), 226(1), 232, 235(1), 236, 258(1) and 259(1) of the constitution of Kenya 2010, seeking the following orders;

1) That this application be certified urgent, service be dispensed with thereof and the same be heard ex parte in the first instance.

2) That a conservatory order be issued staying the Respondents and their officer from appointing any so called partisan staff to the office of the 1st Respondent or any other office of the 2nd Respondent other than those authorized by the salaries and remuneration commission.

3) That pending hearing and determination of the suit a conservatory order be issued staying the appointment by the 2nd Respondent of any advisors special advisors, directors in the office of the governor ,personal assistant to the governor, personal assistant to the deputy governor, personal assistant to the county secretary or other partisan staff known by any other style to any office that is not approved in the 2nd Respondent’s staff established or authorized by the salaries and remuneration commission.

4) That a conservatory order be issued pending any use of public expenditure towards remuneration/ facilitation of advisors special advisors, directors in the office of the governor, personal assistant to the governor, personal assistant to the deputy governor, personal assistant to the county secretary or other partisan staff in the office of the 2nd Respondent whose positions are not authorized by the 2nd Respondent staff establishment and advisories of the salaries and remuneration commission.

5) That an Order of Mandamus be issued and is hereby issued compelling the 2nd Respondent to submit a list of all so-called partisan staff in the payroll of the 2nd Respondent.

6) That an order of Mandamus be issued and is hereby issued compelling the 3rd Respondent to submit a list of all partisan staff in the office of the 2nd Respondent and minutes authorizing their appointment.

7) That the application be heard inter-partes on such date and time as this Honourable Court may direct.

2. The application is supported by the grounds on the face of the application and the affidavit sworn by the Applicant, **Sigei Arap Bett** on 30th September, 2020 and based on the following grounds: -

- a) That, the salaries and remuneration commissions pursuant to Article 230(4) of the Constitution, approved the hiring of a chief staff, three advisors (Political, legal and economic) and a personal assistant as the only partisan staff that can be hired by a county government and paid through County coffers.
- b) That the respondents have without justification employed more than twenty (20) partisan staff including 7 advisors in the office of the 1st Respondent, 3 personal assistants for the office of the deputy governor and 2 assistants in the office of the county secretary among others. The mentioned appointees include, Dr. Mercy Ngeno, the daughter of the chairman to the 3rd Respondent, Mr. Anderson Kirui and Dr. Sitienei employed to serve the 3rd Respondent without any portfolio. Additionally, Mr. Tuei was appointed advisor on tea matters when there is a department of agriculture capable of giving the said advice and Ms. Eunice Benson advisor on gender matters, when she has no qualification or experience handling gender matters.
- c) That the respondents used the covid-19 pandemic as a cover to sneak in the above mentioned employees which issue was raised in social media including a Facebook blog by one Kipkemboi Sosthene and annexed a copy of the Facebook post as annexure LSB-1.
- d) That the said personal assistants are placed in Job group 'R' and above earning a salary of about Kshs. 200,000/- per month despite their jobs not being full time in nature.
- e) That the appointment and remuneration of the said appointees has conferred unfair advantage when they work part time.
- f) That the expansion of the office of the 2nd Respondent is contrary to the provisions of Article 201 of the Constitution which provides for prudent and responsible use of public funds.
- g) That the role allegedly played by the said appointees can be played by other staff in the county and the said appointments are unjustified as they do not serve the public interest of the people of Bomet county.
- h) That the respondents are exercising their powers in a manner that undermines good governance, rule of law and constitutionalism.
- i) That he sought for an explanation on the appointment of the said partisan employees through a letter dated 22nd May, 2020 which did not elicit any response.

3. In opposing the application, the 3rd Respondent through its' chairperson, **Alexander K. Ngeno**, swore a replying affidavit on 20th October, 2020 and filed in this Court on 22nd October, 2020 on the following grounds;

- a) That, the application herein is misguided, incurably defective, bad in law, unsubstantiated and abuse of court process as it has based the said application on unreliable sources.
- b) He contends that all the partisans' appointments were done in accordance with the law and further stated that the petitioner had not demonstrated how the money set for containment of Covid-19 was diverted to payment of the partisan employees.
- c) He alleges that the petitioner has a personal vendetta against him as the chairperson of the 3rd Respondent which caused him to raise complaint against the employment of his daughter to County government of Bomet when the said Dr. Mercy Ngeno has never been appointed by the county government of Bomet neither as she drawn any salary thereof therefore the alleged complaint is without any basis.
- d) That the complaint raised by the alleged blogger in Facebook was done sometimes in March, 2020 therefore there is no urgency in the current matter having been filed in October, 2020.
- e) That the personal staff attached to the governor and the deputy governor are positions created way back in 2018 and authorized by the 3rd Respondent as evidence in Annexure AKN-1.
- f) He stated that the letter of 11th May, 2020 allegedly served to the 3rd Respondent never reached the 3rd Respondent, in any case the said letter is addressed to the CEC of lands and urban planning.
- g) That the recruitment of the employees which the petitioner termed as unending was in relation to the office of the Public service board secretariat, department of health, administration, ICT, Roads, public works and transport as evidence in annexure AKN-2.
- h) That the appointment of Eunice Benson as the advisor for gender matters was revoked on 30th June, 2020 as the same was irregularly done together with all other irregularly appointed partisan members. He stated however that no one was ever appointed as advisor for Tea matters.
- i) He stated further that the department of health Bomet county has employed 7 doctors with various specialization, 82 paramedics

and 63 interns which was needed in aid of Universal Health Coverage as directed by the national government.

j) That the appointment of the office of the 3rd Respondent was done regularly in line with the provisions allocated for the said office as such no violation was done by them.

k) He therefore stated that there are no provisions that have been violated by the respondent to warrant the issuance of conservatory orders and contends further that the court cannot issue orders in vain and prayed for the application to be dismissed with costs to them.

4. The 2nd Respondent also opposed the application and filed a replying affidavit deposed upon on 23rd October, 2020 by Stella Langat, the county secretary of the 2nd Respondent and based on the following grounds.

a) That all the partisan staff members employed by the county government of Bomet are all employed in accordance with authorized staff employment.

b) That any other appointment that was not in line with the law, the 2nd Respondent duly advised the 3rd respondent in line with section 77 of the County Government Act to revoke such appointment which was revoked.

c) That the prayer by the claimant requiring the court to order the respondent to submit the list of its partisan employees is a fishing expedition as the petitioner has failed to adduce evidence to justify his claims.

d) She therefore sought for dismissal of the application.

5. The application herein was disposed of via written submissions with the Applicant filing on 11th December, 2020 and the 3rd Respondent filing on 19th January, 2021. The 1st and 2nd Respondent did not file any submissions.

Applicant's submissions

6. The applicant submitted the suit herein is a public interest suit as it seeks to halt the actions of the respondents who are in a spree to appoint partisan employees contrary to the law which has the repercussion of condemning the county of Bomet to pay over 30 Million as salaries which money is not sanctioned by the salaries and remuneration commission. He argues that since the suit is a public interest litigation the question of damaged not being adequate remedy does not arise leaving the court to decide on three issues;

a) Whether the petitioner has established a prima facie case,

b) Whether the conservatory orders ought to issue to enhance constitutional values and is in public interest and,

c) Whether the court ought to compel the 2nd and 3rd Respondents to submit the list of the partisan staff in the payroll of the 2nd Respondent.

7. The applicant submitted that it he has established a prima facie case to warrant the issuance of conservatory Orders as was held in the supreme Court decision in **Gatirau peter munya –v- Dickson Kithinji & 2 others [2014] eklr**. He argues that the respondents have admitted in their affidavits having made illegal appointment and revoked the advisors' positions as evidence in their annexure AKN-3 by the 3rd Respondent.

8. It was submitted that the petition herein raised serious concerns around article 10 and 232 of the Constitution which requires that the appointment of public officers should be guided by fairness merit, transparency and public participation and cited the case of **London distillers (K) limited –v- cabinet secretary ministry of Education & 4 others [2020] eklr**.

9. According to the Applicant the real danger that will be subverted by the conservatory orders is the expenditure of Public funds for payment of salaries to persons holding positions that were illegally created at the expense of the tax payers to the detriment of the people of Bomet County. He prayed for conservatory orders to issue to stop any further unauthorized use of public funds.

10. The petitioner submitted that Article 35 of the constitution provides that every citizen with a right to access information and that this Court has powers to order the Respondent to submit its partisan staff list at the payroll of the 2nd Respondent in order for the court to ascertain the correct number of the partisan staff and to therefore properly decide on the issue in this suit and cited the case of **Concord insurance company limited- v- NIC Bank limited [2013] eklr**.

11. It was submitted that the partisan staff list is a document that the Respondent are the only person that can access the same and which is necessary in deciding the real issue in this case, and that discovery is made to level up litigation filed for parties as was held by **Kimondo J in Oracle Production Limited –v- decapture limited & 3 others [2014] eklr**.

12. He thus prayed that the application be allowed in the interest of justice.

3rd Respondent's submissions.

13. The respondent herein submitted that the applicant has relied on irrelevant provisions of the law in seeking for conservatory orders which was filed under certificate of urgency which urgency has not been demonstrated as was held in **progress welfare association of Malindi & 3 others –v- count government of Kilifi and 4 others [2020] eklr.**

14. It was submitted that the applicant has not demonstrate that he has a prima facie case with likelihood of success so that if the conservatory orders are not issued he will suffer prejudice as a result of infringement of the constitutions by the Respondent and cited the case of **Benson Wachira Muthiga –v- Nairobi city county public service board and another [2015] eklr.** He argued that the applicant is ambiguous and has not demonstrated with precision the specific provisions of the constitution that are being violated by the Respondents as the Articles mentioned in the Application do not support the prayers sought therein.

15. It was also submitted that the 3rd Respondent is mandated under section 75 of County Government Act to take corrective measure on irregular appointments which the respondent already revoked the irregular appointment therefore the application before Court has been overtaken by events and therefore no prima facie case has been established.

16. Accordingly, he submitted that there is no danger that the applicant is likely to suffer if the conservatory orders are not granted at this stage and he reinforced his argument by citing the case of **benson Wachira Muthiga(Supra).**

17. The 3rd Respondent want the application dismissed for lacking merit.

18. I have examined the averments of the parties herein. I note that part of the prayers being sought by the applicants and in particular No. 3 has been overtaken by events and so is not relevant.

19. As for prayer No. 2, I allow the same as the respondents sought to rely on an authority to make the appointments yet the alleged authority is not legible and so cannot be relied upon.

20. I therefore allow the following prayers;-

1. That a conservatory order be issued staying the Respondents and their officer from appointing any so called partisan staff to the office of the 1st Respondent or any other office of the 2nd Respondent other than those authorized by the salaries and remuneration commission.

2. That pending hearing and determination of the suit a conservatory order be issued staying the appointment by the 2nd Respondent of any advisors special advisors, directors in the office of the governor ,personal assistant to the governor, personal assistant to the deputy governor, personal assistant to the county secretary or other partisan staff known by any other style to any office that is not approved in the 2nd Respondent’s staff established or authorized by the salaries and remuneration commission.

3. Costs in the petition.

Ruling delivered virtually this 13TH day of **JULY, 2021.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Musyoka Anan holding brief for Sigei for the applicant

Present

Sang for the 1st & 2nd respondents present

Mr. Kirui for 3rd respondent present

Court Assistant – Fred and Wanyoike