



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND ALABOUR REKLATIONS COURT

AT KERICHO

ELRC PETITION NO. E008 OF 2021

VINCENT OMAO MARIITA.....PETITIONER

-VERSUS-

COUNTY GOVERNMENT OF NYAMIRA.....1ST RESPONDENT

GOVERNOR NYAMIRA COUNTY.....2ND RESPONDENT

COUNTY SECRETARY, NYAMIRA COUNTY.....3RD RESPONDENT

CHAIRPERSON NYAMIRA COUNTY,

PUBLIC SERVICE BOARD.....4TH RESPONDENT

SECRETARY, NYAMIRA COUNTY,

PUBLIC SERVICE BOARD.....5TH RESPONDENT

RULING

1. The Petitioner filed this suit on 22nd June, 2021 through the firm of Sam N Mainga and Company Advocates. On the same date, the Petitioner filed a Notice of Motion application dated 7th June, 2021 under Certificate of Urgency, seeking the following Orders;

1) THAT the Application be heard exparte in the first instance and same be certified as urgent.

2) That pending hearing and determination of this Application, an injunction do issue stopping the recruitment of the vacant positions in various departments of the 1st Respondent until such a time when the Respondent will do a proper advertisement and or the board to give any other decision in line with the Applicable law.

3) That pending hearing and determination of this Application, inter partes, the 4th and 5th Respondent, either by themselves, agents and servants be and are hereby restrained by a temporary injunction from conducting any interviews of the shortlisted candidates or interviewing any person to the position as advertised in the website of 20th March, 2021.

4) That pending hearing and determination of this Application inter parted, The Respondents herein either by themselves, agents and servants be and are hereby restrained by a temporary injunction from advertising or recruiting any person to the positions as advertised in the website on 20th March, 2021.

5) That pending hearing and determination of this Petition, the Respondent either by themselves, agents and servants be restrained by a temporary order of injunction from advertising or recruiting any person to the vacant positions as conveyed in the county website.

6) That pending hearing and determination of this Application inter partes, the 1st Respondent be restrained by this Honourable Court from admitting into the payroll or expending Public Funds on the employees whose employment is impugned in this petition.

7) That pending hearing and determination of this Petition, the 1st Respondent be restrained by this Honorable Court from admitting into the payroll or expending public funds on the employees whose employment is impugned in this Petition.

8) That pending hearing and determination of this Application inter partes, the Respondents be compelled to cancel the advertisement posted in the County website on 22nd March, 2021.

9) That pending hearing and determination of this Petition, the Respondent be compelled to cancel the advertisement posted in the county government website on 21st March, 2021.

10) Costs of this Application be provided for in any event be borne by the Respondents.

11) Such further Orders be borne by the Respondents.

2. The Application is supported by the Grounds on the face of the Application and the supporting Affidavit sworn on 7th June, 2021 by the Claimant, **Vincent Mariita Omao** and based on the following grounds.

a) That the 1st Respondent through the 4th and 5th Respondent by a Notice in the County website declared several vacancies on 20th March, 2021 and invited applications to be submitted by 9th April, 2021.

b) That the 4th Respondent was obliged to advertise the said vacancies in at least one newspaper of wide circulation within the County but it failed to do so.

c) That no employment and recruitment can be undertaken without the sanctioning of the 4th Respondent's board.

d) That the 4th and 5th Respondent in the advertisement for the said vacancies have restricted requirements which were not contemplated under section 13(2) of the County Government Act.

e) It was contended that by restricting applications of the vacant positions only to those whose academic qualifications march or are relevant to the department is not only discriminatory, mischievous but meant to lock out competent person capable of discharging the said duties even though they may not have specific qualification relevant for the department.

f) That the recruitment exercise is being carried out without the necessary budgetary allocation.

g) That because of the said restriction, several persons who are competent are bound to miss the opportunity, therefore making the said advertisement discriminatory, biased, flawed and contrary to the Constitution and the County Government Act. further that the Public Service Board did not meet before the said advertisement was published in the Respondents website.

h) That unless an injunction is issued in the interim the employees who would have been employed and paid salaries, would not be in a position to refund the said monies as they have no know means therefore the paymaster will be at loss.

i) That the Orders sought are in protection of the public funds in accordance with Article 207 of the Constitution of Kenya 2010.

3. The Respondents opposed the said application and filed a replying Affidavit deposed upon on the 6th July, 2021 by **Peter Kereri**, the Chairman Nyamira County Public service Board and based on the following grounds;

a) That the application herein is frivolous vexatious and an abuse of Court process as the application seek to satisfy some selfish personal interest and not to provide any complimentary oversight authority contemplated under section 87 of the County Government Act.

b) It was stated that the Petitioner is a vexatious litigant who has persistently instituted suits against the County government of Nyamira with the sole purpose of arm twisting the County and abandoning the suit as he did in Kisumu ELRC Cause No. 33 of 2017.

c) It was averred that the Petitioner has not indicated with precision which process the county Government has flawed in recruitment of the said employees.

d) It was stated that the County Public Service Board advertised various position that had become vacant in line with section 66 of the County Government Act after a thorough consultative meetings and a resolution passed. He annexed the resolution as PK-2.

e) It was averred that the Petitioner is not an employee of the County Government as such is not aware of the process followed and meetings undertaken to warrant his spurious allegations.

f) It was contended that the claim by the Petitioner that the new positions advertised have not been budgeted for is baseless and that no evidence of such default had been tabled by the Petitioner. Further that the Petitioner has failed to request such information as provided for under section 96 of the County Government Act to enable him authoritatively exercise his oversight role granted under section 87 (e) of the County Government Act.

g) The Respondent contends that section 66 of the County Government Act does not make it mandatory for the advertisement to be made in a newspaper but only in mode that would reach a wide population especially persons that may be disadvantaged. Nevertheless the said vacancies were advertised in one of the local dailies as evidenced in annexure PK-3 therefore the allegation that the advertisement did not reach a wide population is without basis.

h) That section 95 of the County Government Act, included County website as a forum in which communication may be passed to the public.

i) That the allegation that the qualification requirement imposed by the Respondents is against section 13(2) of the County Government Act is misguided as the said section talks about requirement for appointment of County clerk and not all county government employees.

j) It was stated that section 65 of the County government Act empowers the County service Board to consider various qualifications necessary for the different positions. Further that Section 46,55(b) (c) and 63(2)(c) and 65 of the County Government Act empowers the County public service Board to ascribe itself to the necessary qualification needed by the Applicants for the various positions while taking into account the County government objectives of efficiency, quality and productive service. Therefore he contends that there was no discrimination in the advertisement as alleged.

k) It was stated that the interview of the shortlisted has already been carried out before the filling of this suit therefore prayer 3,4 and 5 have been overtaken by events while prayer 6 and 7 are voidable in law as the Respondent have not recruited such person to warrant the issuance of the said Orders.

l) The Respondent concluded that the Application is without merit and the same ought to be dismissed with costs.

4. The Petitioner filed a further Affidavit in reply to the Replying Affidavit on 12th July, 2021 and averred that Kisumu Petition 33 of 2017 was against the late Governor John Obiero Nyagaram which he obtained orders against him. He also maintained that the procedure followed in advertisement and recruitment was flawed. he alleged that the Respondents advertised some position as vacant when they had already filled the said position with handpicked persons and gave example of Assistant director integration person and payroll database, and director of Human resources who are already in office.

5. The Petitioner further stated that the 4th Respondent has usurped the power of the 5th Respondent and advertised the vacancies, signed all documents and shortlisted. He therefore averred that the Respondents have illegally conducted the Recruitment which will cost the people of Nyamira County if they are not stopped by an Order of this Court.

6. The Application herein proceeded by way of oral submissions on 15th July, 2021, where the Applicant Advocate submitted and sought to rely on the Affidavits filed on 7th June, 2021 and the further Affidavit sworn on 17th June, 2021 together with all annexure therein and prayed that the Application be allowed as prayed.

7. Mr. Ligunya advocate for the Respondents submitted that there are two issues for determination; the process the Respondents used to fill the position in the county and what rights have been violated. Counsel cited the case of **Justus Kimeli Rotich –v- County Government of Nandi [2016] eKLR** and submitted that the Petitioner has merely listed several Articles of the constitution without demonstrating explicitly how they have been violated.

8. It was submitted further that section 66 of the County Government Act provides for procedure to be followed in filling vacant position at the County Government and argued that the Respondent not only advertised the positions in their website but also in a local newspaper of wide circulation within the County.

9. On the issue of whether the Public Service Board convened a meeting before the vacancies were advertised, it was submitted that the Board met and deliberated on budgetary allocation therefore the issue was accounted for beforehand.

10. The Respondent therefore urged this Court to dismiss the Application.

11. I have examined the averments of the parties herein. The applicant has contended that through the adverts placed by the 4th & 5th respondents, on 20th March 2021, there was restriction placed on qualifications not contemplated by Section 13(2) of the County Government Act.

12. The applicant annexed the advert in question as annexure VMO I. The adverts set out the positions advertised, the duties and responsibilities and the requirements for appointment.

13. The applicant averred that these requirements were restrictions and against the provisions of Section 13(2) of the County Government Act.

14. Section 13(2) of the County Government Act states as follows;

13. Clerk and staff of the county assembly

(1) ...

(2) A person shall not be qualified for appointment as a clerk of the county assembly unless such person—

(a) is a citizen of Kenya;

(b) holds a degree from a university recognised in Kenya or its equivalent;

(c) has had at least five years relevant professional experience;

(d) meets the requirements of leadership and integrity set out in Chapter Six of the Constitution.

15. The stated Section deals specifically with the appointment of Clerk to the County Assembly and not to the advertised positions which are all varied.

16. The applicant has therefore not demonstrated how and what part of the County Government Act has been flouted by the respondent in the advert.

17. Other than the complaint that the advertisement is restrictive, the applicant has also deponed that the 4th respondent was obliged to advertise the vacancies in at least one local daily of wide circulation in the county and which he avers that the respondent failed.

18. The respondent in answer to this complaint deponed that there is no such requirement for advertisement in a local daily. The respondent depones that Section 66 of the County Government Act obliges them to ensure advertisement through modes of communication so as to reach as wide a population of potential applicants and especially person who for any reason have been or may be disadvantaged.

19. Indeed that is what the law envisages and Section 66 of the County Government Act 2012 provides as follows:-

66. Advertisements of positions to be widely publicised

If a public office is to be filled, the County Public Service Board shall invite applications through advertisement and other modes of communication so as to reach as wide a population of potential applicants as possible and especially persons who for any reason have been or may be disadvantaged.

20. The respondent also deponed that they actually set out advertisement in respondent's website and also through one local daily as demanded by the petitioner and they attached Appendix PK3 as an exhibit.

21. Appendix PK is actually an advert in the daily and on respondent's website and therefore the complaint by the applicant on this issue of where and how the advert was to be made is not justified.

22. The applicant also complained that the adverts were done without the sanctioning of the 4th respondent's Board. The advert however as indicated was placed by the 4th Respondent board and the respondent also filed PK 2 which is a copy of the resolution of the consultative meetings held by the respondents various organs. The 4th respondent did not deny being part of these resolutions.

23. Having considered the averments and submissions of the parties, I also note that the adverts were done, shortlisting proceeded and interviews were scheduled to be conducted in June 2021.

24. This application was filed on 22/6/2021 when most probably the interviews had been conducted and therefore some of the orders sought, had been overtaken by events.

25. In the circumstances and based on my analysis above, I find the application is not merited and I dismiss the application accordingly.

26. Costs in the petition.

Ruling delivered virtually this 21st day of **SEPTEMBER, 2021.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Mr. Ligunya for Respondents – present

Miss Shilwatsa holding brief Mainga for Petitioner – present

Court Assistant - Fred