



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**PETITION NO. E030 OF 2021**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 1(3)(c), 2(1), 3(1), 10, 22, 23(1), 73, 74, 75, 79, 80,**

**159(1), 160(5), 161(2)(b), 163(b), 165(3)(a), (b) & 3(d)(ii), 166(2)(c) & (3), 258,**

**259(1) & (3) AND 260 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF PRINCIPLES OF LEADERSHIP AND INTEGRITY**

**UNDER CHAPTER 6 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF RESPONSIBILITIES OF LEADERSHIP**

**UNDER ARTICLE 73 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE PRINCIPLES GOVERNING THE CONDUCT OF**

**STATE OFFICERS UNDER ARTICLE 75 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF SECTIONS 3, 4, 5, 6, 7, 8 AND 11 OF THE**

**LEADERSHIP AND INTEGRITY ACT NO. 19 OF 2012**

**AND**

**IN THE MATTER OF THE GENERAL LEADERSHIP AND INTEGRITY CODE**

**AS SET OUT IN PART II OF THE LEADERSHIP AND INTEGRITY ACT NO. 19 OF 2012**

**BETWEEN**

**VINCENT MARIITA OMAO** **PETITIONER**

COUNTY GOVERNMENT OF NYAMIRA	1 <sup>st</sup> RESPONDENT
GOVERNOR, NYAMIRA COUNTY	2 <sup>nd</sup> RESPONDENT
COUNTY SECRETARY, NYAMIRA COUNTY	3 <sup>rd</sup> RESPONDENT
CHAIRPERSON, COUNTY PUBLIC SERVICE BOARD	4 <sup>th</sup> RESPONDENT
SECRETARY, COUNTY PUBLIC SERVICE BOARD	5 <sup>th</sup> RESPONDENT

### JUDGMENT

1. Vincent Mariita Omas (the Petitioner) lodged a Petition with the Court on 4 May 2021, alleging that the Respondents' recruitment and/or promotion of some 34 health workers and sub-county administrators was unconstitutional.
2. The Petitioner further alleged that the Chairperson County Public Service Board, County of Nyamira, was not fit to hold public office.
3. Filed with the Petition was a Motion under a certificate of urgency seeking interim interdicts.
4. When the Motion and Petition were placed before the Court on 5 May 2021, it directed that the Petition and Motion would be heard together (the Court further directed that a Preliminary Objection from the Respondents would be addressed at the same time).
5. Pursuant to directions given on 12 May 2021, the following were filed:
  - (i) Preliminary Objection and Replying affidavit by the Secretary/Chief Executive Officer of the County Public Service Board (the Board) on 29 June 2021.
  - (ii) Further affidavit by the Petitioner on 15 July 2021.
  - (iii) Response to Petition on 16 July 2021.
  - (iv) Replying affidavit by 4<sup>th</sup> Respondent on 16 July 2021.
  - (v) Submissions by the Petitioner on 16 July 2021.
  - (vi) Submissions by the Respondents on 29 September 2021 (should have been filed by 12 August 2019).
6. The Court has considered the Petition, Motion, Preliminary Objection and affidavits and come to the view that the Petition is without merit.

#### **Due process and fair hearing: Joinder of parties likely to be affected**

7. First, the remedies sought by the Petitioner were:
  - (i) A declaration that the 4<sup>th</sup> Respondent is not a suitable person to hold office as the Chairperson of the County Public Service Board of the County of Nyamira.
  - (ii) A declaration that the actions of the 4<sup>th</sup> Respondent in this cause violated the Constitution under Articles 27, 35(1)(b) and (2), 36(1), 47, 50(1) and (2), 73, 74 and 75 of the Constitution of Kenya.
  - (iii) An order of judicial review of certiorari be issued to remove into the Honourable Court for quashing all the illegal promotions of staff, hiring of staff as conveyed by the letter issued by the 4<sup>th</sup> Respondent who promoted staff without the relevant advertisement, illegal minute of the meetings and without due regard to the provisions of the County Governments Act, No. 17 of 2012 and Article 10 of the Constitution, 2010.
  - (iv) A declaration that the recruitment of staff by the 4<sup>th</sup> Respondent is irregular and unprocedural (and) was in breach of Article 47 of the Constitution of Kenya.
  - (v) An order against the Respondents compelling them to cancel the letters appointing the 34 health workers in the Department of Health, Nyamira County as purported.
  - (vi) An order of judicial review of certiorari be issued to remove into the Honourable Court for quashing the decision of the Respondents appointing the 34 health workers in the Department of Health, Nyamira County and as conveyed by letters issued by the Respondents who were employed without relevant advertisement and without due regard to the provisions of the County

Governments Act, No. 17 of 2012 and Article 10 of the Constitution.

(vii) An order declaring the said decision of the Respondents prompting to recruit 34 health workers in the Department of Health, Nyamira County and subsequent issuance of letters of appointment was illegal and irregular, and the same brought into the Court and be quashed pursuant to an order of certiorari.

(viii) A permanent injunction restraining the Respondents either by themselves, agents, servants and/or employees from admitting the subject employee to the payroll of the County Government of Nyamira and/or making any payments to and/or in favour of the said 34 health workers in the Department of Health, Nyamira County, either on account of remuneration, allowances and/or salaries without the necessary budgetary approval of the Nyamira County Assembly whatsoever and/or howsoever.

(ix) A permanent injunction restraining the Respondents either by themselves, agents, servants and/or employees from employing, recruiting and/or enlisting the 34 health workers in the Department of Health, Nyamira County without complying with the due process of the law and, in particular the provisions of the County Governments Act, No. 17 of 2012 and Article 10(1) of the Constitution, 2010.

(x) The Honourable Court do order that the costs of this Petition be borne by the Respondents.

(xi) Such other orders as this Honourable Court shall deem fit and just to grant in the circumstances.

8. First, the primary disputation raised by the Petitioner revolves around the recruitment by the Board (or a section of the Board) of some 34 health workers.

9. The Petitioner admits that the said persons were already recruited.

10. In the circumstances, such persons have acquired accrued contractual rights and interests, and it would be against the rules of natural justice and procedural fairness for the Court to make adverse orders without affording them an opportunity to be heard.

11. It was therefore fatal for the Petitioner to exclude them from the Petition either as Respondents or Interested Parties.

#### **Exhaustion of alternative dispute resolution set out in the law**

12. Article 234(2)(ii) of the Constitution as read with section 77 of the County Governments Act and sections 85, 86, and 87 of the Public Service Commission Act has given the Public Service Commission first instance jurisdiction in disputes arising out recruitment and appointments within a county public service.

13. Section 87(2) of the Public Service Commission Act expressly outlaws first instance court proceedings before the appellate procedure through the Public Service Commission is exhausted.

14. The Petitioner did not demonstrate that any attempt was made to resolve the dispute in terms of the aforesaid provisions, and the Court finds its jurisdiction was invoked prematurely.

#### **Abuse of office: Removal of Chairperson of a county public service board**

15. The removal from office of the Chairperson of a County Public Service Board is well set out in section 58(5) of the County Governments Act.

16. The provision envisages a petition and vote by the County Assembly in the process to remove the chairperson of a county public service board.

17. This Court would be usurping the first instance jurisdiction of the County Assembly with that mandate if it were to purport to consider and order the removal from office of the Chairperson.

18. Before concluding, the Court observes that there is no evidence on record that all the Respondents were served with the pleadings as had been directed.

#### **Conclusion and Orders**

19. From the foregoing, the Court finds no merit or competence in the Petition, and it is dismissed with costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 8TH DAY OF OCTOBER 2021.**

**RADIDO STEPHEN, MCI Arb**

**JUDGE**

**Appearances**

For Petitioner O.H. Bunde & Co. Advocates

For 5<sup>th</sup> Respondent Sam N. Mainga & Co. Advocates

Court Assistant Chrispo Aura