



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO.E078 OF 2021

STEPHEN KARIUKI GATUHA.....PETITIONER

VERSUS

COUNTY ASSEMBLY SERVICE BOARD OF KIAMBU.....1ST RESPONDENT

CLERK, COUNTY ASSEMBLY OF KIAMBU.....2ND RESPONDENT

RULING

The ruling herein relates to two applications, one dated 11th May, 2021 and another dated 1st July, 2021.

Application dated 11th May, 2021 is seeking for orders that;

1. Spent.
2. Spent.
3. Spent.
4. Spent.
5. Pending hearing and final determination of this petition the court be pleased to order that the respondents decision arrived at during its 213th meeting held on 11th March 2021 and the letter dated 31st March 2021 re-designating the petitioner to the office of Manager Welfare, hospital and Events from the office of Director of Human Resources in the County Assembly of Kiambu be suspended.
6. Pending hearing and final determination of this petition the respondent its agents and/or employees be restrained from advertising, recruiting, employing the Director Human Resources County Assembly of Kiambu and or in any way other than replacing and / or appointing any officer in an acting capacity as Director of Human Resources.
7. Pending the hearing and final determination of this petition the petitioner be reinstated to the office of Director of Human Resources.
8. pending hearing and final determination of this petition the court be pleased to order that the respondent be restrained from transferring, deploying or seconding the petitioner to any other office or working station.
9. Costs of this application.

The application is supported by the petitioners affidavit and on the grounds that the petitioner is a human resource practitioner with a bachelor's degree in human resource management and diploma in human resource management and certificate in labour law and a certified mediator with full membership of the Institute of Human Resources Management currently employed by the 1st respondent from 1st January, 2015.

Other grounds are that by letter dated 31st March, 2021 the 2nd respondent issued notice de-designating the petitioner to the position of manager welfare, hospitality and events with effect from 1st April, 2021 and reporting to the Deputy Clerk (Administration) and that unless

he took up such re-designation he would be deemed to have absconded duty and disciplinary proceedings instituted against him.

Such decision is taken in bad faith meant to punish and embarrass the petitioner and contrary to the constitution. the petitioner was not notified of any proceedings against him by the County Assembly at its 213th meeting held on 11th March, 2021 nor was his consent obtained for change of office contrary to section 69 of the County Government Act, section 40 of the Public Commission Act, the County Assemblies Services Act and Regulations to the Kiambu County Assembly Human Resources Policies and Procedures.

The officer of manager welfare, hospitality and events does not exists within the respondent or in any systems. The petitioner does not possess any training in he given areas and his re-designation is purely a waste of public funds and deliberate move to place him at a level of incompetence with intent to dismiss him after heavily investing in self-development locally and internationally

In his affidavit, the petitioner avers that upon employment by the 1st respondent as Principal Human Resource Officer he was of exemplary performance and on 24th September, 2019 was promoted to Director of Human Resource and Administration Services but on 31st March, 2021 he received notice of re-designation to manger Welfare, Hospitality and Events without prior notice and contrary to the law and policies of the respondent. he has no qualifications for the area did not post nor does the same exist in the system and only meant to place him at a place for dismissal.

The petitioner also avers that the respondent has heavily invested in his training locally and abroad in his area of expertise and the de-designation will lead to wastage of public funds as he has no knowledge of the area.

The respondents are in the process of recruiting and replacing the petitioner an if not stopped and there be reinstatement, the ends of justice will be defeated and the re-designation is ill-motivated and though not invited for any hearing before the 1st respondent made a decision at its 213th meeting he can surmise that various events have led to such position. the petitioner raised issues of human resource decisions with the 2nd respondent; on 20th August, 2020 he issued a memo pertaining to long listing and shortlisting of applicants for the position of principal human resource officer, principal communication and public affairs officer, senior legal officer, internally auditor, ICT, chairperson audit committee and members of audit committee; which report was ignored and new long and shortlists developed and applicants who had not been shortlisted were added which resulted in gross irregularities.

The petitioner avers that he is being punished with re-designation for being professional and working with integrity. Such deployment is contrary to Article 236(a) of the Constitution and unless there is reinstatement and the respondents stopped from advertising for the position there shall be injustice as memo dated 28th April, 2021 issued to all directors confirm the petitioner has been re-designated and he shall therefore suffer irreparable loss and damage unless the orders sought are not issued.

In the application dated 1st July, 2021 the petitioner is seeking for orders that;

The court be pleased to grant a temporary injunction restraining the respondent by themselves, servants, agents or otherwise or any person action on their behalf from employing, receiving applications from the interested candidates, shortlisting, scheduling for interview, interviewing, selecting, appointing and or in any manner whatsoever recruiting to fill the position of the Director Human Resources as per an advert placed page 32 of the Daily Nation newspaper dated Friday, 25/06/2021 and/or other advert pending the hearing and determination of the petition herein.

The court be pleased to issue a Notice to Show Cause to the Members of the respondent especially the Speaker County Assembly of Kiambu and the Acting Clerk County Assembly of Kiambu who are chairperson and secretary to respondents respectively to show cause why they should not be committed to civil jail for disregarding and disobeying the court orders issued on 21/05/2021.

The application is supported by the petitioner's affidavit and on the grounds that this court on 21st May, 2021 issued an order directing parties to maintain the *status quo* with the petitioner retaining the position as redeployed and the respondent not to advertise, replace or in any manner fill the position of the director human resources. However, the respondents have advertised the job vacancy at page 32 of the Daily Nation newspaper on 25th June, 2021 and which closed on 16th July, 2021.

The action of the respondents is contrary to the orders of the court and unless stopped, the petition and the orders prayed for will be rendered nugatory and the dignity of the court eroded by the acts of disobedience of court and hence the respondents especially the Speaker County Assembly of Kiambu and Acting Clerk County Assembly Kiambu would be issued with show cause notices to attend court and explain why they should not be committed to civil jail.

The respondent, County Assembly Service Board of Kiambu filed the **Replying Affidavit of Simon Kimani Rugu** the clerk and secretary and has authority to reply herein. He avers that the respondent as a statutory body and the petitioner has come to court prematurely contrary to Article 234(2)(i) and (ii) of the Constitution read together with section 85, 86 and 87 of the Public Commissions Act which requires he files an appeal with the Public Service Commission.

Mr Rugu also avers that the petition violates the provisions of section 9 of the Fair Administration Act which requires that there is no review of an administrative action or decision unless internal mechanisms available are exhausted. No leave has been obtained to move the court before the petitioner moved the court and this renders the application and the petition incompetent.

Rugu also avers that the petitioner has not told the truth. The court orders issued on 21st May, 2021 were extracted on 23rd June, 2021 a period of 39 days and the application and petition were served on 5th July, 2021.

Pursuant to section 40 of the County Assemblies Services Act the respondent advertised the position of director human resources without

knowledge of the on-going case or order and thus did not act contrary to what they were not aware of. being unaware of these court proceedings, the respondent only entered appearance on 10th June, 2021 when the matter was due for hearing.

There is no evidence of service of the court orders herein which was only done on 5th July, 2021.

The respondent has used public resources to advertise in the daily newspapers and it will prejudice them if the process is halted and the court should allow receipt of applications since the petition is premature contrary to section 77 of the County Government Act which allow for appeals against decisions of a body exercising administrative action.

The position of hospitality and events manager exists in the organogram which the petitioner has produced in support of his case together with the scheme of service for the position. the re-designation of the petitioner is done pursuant to section 2 of the County Government Act and does not divert the petitioner from his career path and the petition is not premised on a *prima facie* case. He previously held the position of human resource and administration as proof that his career area is not changed. There is no reduction in cadre or salary nor is there a demotion in rank and the petition and applications before court should be dismissed with costs.

The petitioner filed his Supplementary Affidavit and avers that the primary provision of Article 234(2) of the Constitution does not provide for an appeal process in the absence of a statute clearly providing for the same. Section 77 of the County Government Act is not couched in mandatory terms and is left to the discretion of the court to make a determination for an aggrieved person seeking justice with regard to violation of constitutional and labour rights pursuant to section 12 (3) of the County Government Act.

The petitioner also avers that the court order issue don 21st May, 2021 was within the knowledge of the respondents but they opted to disobey. The respondent have no department of Welfare, hospitality and events and there is no staff allocated to such department to justify re-designation form human resources department and the orders sought should issue.

On the applications, affidavits and written submissions, the issues which arise for determination are whether the respondent's decision of its 213th meeting of 11th March, 2021 re-designating the petitioner should be suspended and restrained from replacing the position and petitioner be reinstated; whether the orders of 21st May, 2021 have been disobeyed by the respondent and therefore be punished; and whether the petition is filed in abuse of court process and the provisions of Article 234(2) of the Constitution and section 77 of the County Government Act.

Before addressing the substantive issues in the applications by the petitioner, the respondents have raised serious matters of the constitution and the law with regard to the application of Article 234(2) of the Constitution, section 77 of the County Government Act and section 9 of the Fair Administration Act.

In his Supporting Affidavit attached to the Notice of Motion dated 11th May, 2021 the petitioner attached his letter of employment dated 11th December, 2014 referenced;

LETTER OF APPOINTMENT

You are hereby offered employment with Kiambu County Assembly Service Board as a Principal Human Resource Management Officer ... reporting to the Clerk, Kiambu County Assembly ...

These facts are not in dispute.

The petitioner is an employee of the Kiambu County Assembly Service Board regulated under the provisions of County Assemblies Service Act. such an employee is regulated under the dispute resolution mechanisms available to Kiambu County Assembly Service Board employment.

Whereas under Article 234(2)(i) of the Constitution the Public Service Commission is vested with the function of hearing and determining appeals from decisions of county public service boards under section 77 of the County Governments Act, an employee of a County Service Board should lodge his complaint with such organ in the first instance and before moving the court with the only exception being where the petition relates to the interpretation of the constitution and the law, which is not the case here.

The substance of the petition is the decision of the respondent at its 213th meeting held on 11th March, 2021 with the re-designation of the petitioner and matters relating to replacing him as the Director Human Resources.

Section 77 of the County Government Act provides that;

77 Appeals to the Public Service Commission

(1) Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the "Commission") against the decision.

(2) The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of —

- (a) *recruitment, selection, appointment and qualifications attached to any office;*
 - (b) *remuneration and terms and conditions of service;*
 - (c) *disciplinary control;*
 - (d) *national values and principles of governance, under Article 10, and values and principles of public service under Article 232 of the Constitution;*
 - (e) *retirement and other removal from service;*
 - (f) *retirement and other removal from service;*
 - (g) *pension benefits, gratuity and any other terminal benefits; or*
- (3) *An appeal under subsection (1) shall be in writing and made within ninety days after the date of the decision, but the Commission may entertain an appeal later if, in the opinion of the Commission, the circumstances warrant it.*
- (4)
- (5) *Any person dissatisfied or affected by a decision made by the Commission on appeal in a decision made in a disciplinary case may apply for review, and the Commission may admit the application if—*
- (a) *the Commission is satisfied that there appear in the application new and material facts which might have affected its earlier decision, and if adequate reasons for the non-disclosure of such facts at an earlier date are given; or*
 - (b) *there is an error apparent on the record of either decision.*
- (6)

Section 77 of the County Government act must be read together with Article 234(2) of the constitution on the functions of County Public Service Board and the Public Service Commission and its constitutive Act the Public Service Commission Act which under section 85 provides that;

85 The Commission shall, in order to discharge its mandate under Article 234 (2) (i) of the Constitution, hear and determine appeals in respect of any decision relating to engagement of any person in a County Government, including a decision in respect of—

- (a) *recruitment, selection, appointment and qualifications attached to any office;*
- (b) *remuneration and terms and conditions of service;*
- (c)
- (d) *national values and principles of governance, under Article 10 and values and principles of public service under Article 232 of the Constitution;*
- (e) *retirement and other forms of removal from the public service;*

the Court of Appeal in **Secretary, County Public Service Board v Hulbhai Gedi Abdille (2017) eKLR** in addressing the provisions of section 77 of the County Government Act held that;

There is no doubt that the Respondent initiated the judicial review proceedings in utter disregard to the dispute resolution mechanism availed by Section 77 of the Act. The Section provides not the only forum through which the Respondent could agitate her grievance at first instance, but the jurisdiction thereof is a specialized one specifically tailored by the legislators to meet needs such as the Respondent's. In our view, the most suitable and appropriate recourse for the Respondent was to invoke the appellate procedure under the Act rather than resort to the judicial process in the first instance.

And in **Abdikadir Suleiman v County Government of Isiolo & Another [2015] eKLR** the Court held that Section 77 of the County Government Act ousts the jurisdiction of this court in matters such as the one before me and held that;

Article 234(2) (i) of the Constitution provides that the Public Service Commission is vested with the function and power to hear and determine appeals in respect of county governments' public service. Article 262 defines "public service" to mean the collectivity of all individuals, other than state officers, performing a function within a state organ. Accordingly, and firstly, the court holds that the power of the Commission to hear and determine appeals in respect of county governments' public service constitutionally applies only to public officers, and not state officers, in the service of the county governments or any other state organ. Secondly, the court holds that section 77 of the County Governments Act, 2012 amplifies and brings into operation Article 234(2) (i) of the Constitution

This court reading of the instant petition, the application dated 21st May, 2021 and the nature of orders sought, the court is moved prematurely. There exists a primary forum for the petitioner to agitate his complaint(s) against the respondents.

To therefore delve into the other issues in dispute would be purely academic.

Accordingly, application before court dated 21st May, 2021 and 1st July, 2021 are hereby dismissed and the Petition struck out. Each party shall bear own costs.

DELIVERED IN COURT AT NAIROBI THIS 7TH DAY OF OCTOBER, 2021.

M. MBAR?

JUDGE