



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITION NO. E035 OF 2021

IN THE MATTER OF ARTICLES 2, 3, 10, 22, 27, 35, 73, 159, 165, 226, 232, 235, 236, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 10, 35, 73, 226, 232, 235 AND 236 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT

AND

IN THE MATTER OF THE PUBLIC APPOINTMENTS (COUNTY ASSEMBLIES) APPROVAL ACT

AND

IN THE MATTER OF THE EMPLOYMENT ACT, CAP 226

AND

IN THE MATTER OF THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT

AND

IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT

BETWEEN

LEONARD SIGEI ARAP BETT.....PETITIONER

VERSUS

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

BOMET COUNTY PUBLIC SERVICE BOARD..... 2ND RESPONDENT

COUNTY ASSEMBLY OF BOMET.....3RD RESPONDENT

ERIC NGETICH4TH RESPONDENT

JOB TOWETT.....5TH RESPONDENT

ZADDY CHUMO6TH RESPONDENT

MILCAH RONO7TH RESPONDENT

SIMON LANGAT..... 8TH RESPONDENT

DR RICHARD SIGEI9TH RESPONDENT

DAVID KOECH.....10TH RESPONDENT

JOSEPH KEBENEL.....11TH RESPONDENT

DR ALEXANDER CHIRCHIR..... 12TH RESPONDENT

PHILEMON RUTTO..... 13TH RESPONDENT

DAVID KIKWAI.....14TH RESPONDENT

AND

NICHOLAS KERICH.....1ST INTERESTED PARTY

VICTOR NGETICH.....2ND INTERESTED PARTY

RULING

1. Leonard Sigei arap Bett (the Petitioner) lodged a Petition with the Court on 17 May 2021 against the Governor, County of Bomet, the County Public Service Board, Bomet and 12 others alleging that the renewal of the contracts of the 4th to 14th Respondents as Chief Officers was unlawful because the same were not subjected to the requirements of the Public Appointments (County Assemblies) Approval Act and the County Governments Act.
2. The Petitioner also alleged that the Governor, County Public Service Board and the County Assembly failure or omission to renew the contracts of the 2 Interested Parties was not based on any cogent or discernible criteria.
3. The decision to reappoint the Chief Officers, the Petitioner asserted, violated Articles 47, 73 and 235 of the Constitution.
4. It was further contended that no budgetary allocations had been made for the appointments.
5. Filed with the Petition was a Motion under a certificate of urgency seeking interim conservatory orders.
6. The Court directed the Petitioner to serve both the Motion and the Petition.
7. The County Assembly filed Grounds of Opposition to the Motion and Petition on 14 June 2021.
8. On the same day, the Governor filed a replying affidavit to the Motion and Petition.
9. When the parties appeared before the Court on 30 June 2021, the Court directed them to file and exchange submissions on a jurisdictional question arising from Article 234(2)(i) of the Constitution as read with section 77 of the County Governments Act and sections 85, 86 and 87(2) of the Public Service Commission Act.
10. The Petitioner filed his submissions on 6 July 2021, while the 5th, 6th and 9th Respondents filed joint submissions on 13 July 2021.
11. The 4th and 7th Respondents filed their submissions on 19 July 2021.

Submissions by the Petitioner

12. The Petitioner submitted that section 77 of the County Governments Act and sections 85, 86 and 87(2) of the Public Service Commission Act only become implicated where a person is aggrieved with the decision of a County Public Service Board.
13. In the instant case, the Petitioner asserted that the County Public Service Board had not made any decision that could be appealed to the Public Service Commission.
14. The decision under attack, the Petitioner contended, was that of the Governor of making appointments without complying with the provisions of the Public Appointments (County Assemblies) Approval Act.
15. The Petitioner further urged that under Regulation 8 of the Public Service Commission (County Governments Public Services Appeals Procedures) Regulations, 2016 did not contemplate members of the public or ordinary citizens making appeals to the Public Service Commission (it was argued that the appeal could only be made by a public officer).
16. The Public Service Commission, the Petitioner, submitted, did not have appellate jurisdiction over decisions or appointments made by a Governor.
17. In the same breathe, the Petitioner was of the view that the Public Service Commission could not determine constitutional questions or grant interim injunctive relief as were sought in the Motion.
18. The Petitioner cited the cases of *Secretary, Wajir County Public Service Board v Hulbal Gedi Abdille* (2017) eKLR, *James Tinai Murete & Ors v County Government of Kajiado & 22 Ors* (2015) eKLR, *Zena Achieng Mohamed v County Public Service Board of Kilifi & 6 Ors* (2021) eKLR, *Abdikadir Suleiman v County Government of Isiolo & Ar* (2015) eKLR and *James Ore v Office of the Governor, County Government of Marsabit & Ar* (2021) eKLR.

Respondents' arguments

19. For the Respondents who filed submissions, the view was taken that administrative bodies performing quasi-judicial functions could properly determine constitutional issues arising within their remit, and reliance was placed on the Supreme Court decision in Petition No. 3 of 2016, *Albert Chaurembo Mumba & 7 Ors v Maurice Munyao & 148 Ors* wherein the Court pronounced itself on the doctrine of exhaustion of alternative remedies before moving to Court.
20. According to the Respondents, the Petitioner fell within the category of persons contemplated by section 77 of the County Governments Act, and therefore by virtue of section 77(2) of the County Governments Act, the Public Service Commission had the requisite jurisdiction over the dispute as the complaint related to the *recruitment, selection, appointment and qualifications* attached to the office of a chief officer.
21. These Respondents further asserted that the Petitioner had not placed before the Court any evidence that the Governor had solely re-appointed the Chief Officers.
22. The Court has considered both the Motion, Petition, affidavits, Grounds of Opposition and submissions.
23. One of the Petitioner's main complaints was in relation to the purported recruitment and/or appointment and qualifications of the 4th to 14th Respondents in the office(s) of Chief Officers.
24. Section 77(2) of the County Governments Act mandates the Public Service Commission to hear appeals against a decision to *recruit, select or appoint* a person to occupy a county public service office.
25. However, the section does not set out who is competent to appeal.
26. Nevertheless, section 86 of the Public Service Commission Act decrees that *any person* who is dissatisfied or affected by a decision of *any authority or person* in respect of a county public service may appeal to the Public Service Commission.
27. And since the recruitment and appointment of the 4th to 14th Respondents was within the jurisdiction of the county public service, it is the view of this Court that it behoved the Petitioner to exhaust the appeal procedures set out in the County Governments Act and Public Service Commission Act before moving the Court.
28. In the circumstances, the Court finds that the reliance placed on Regulation 8 of the Public Service Commission (County Governments Public Services Appeals Procedures) Regulations, 2016 by the Petitioner is misplaced.
29. By moving the Court before appealing to the Public Service Commission, the Petitioner was invoking the Court's jurisdiction prematurely and this is not permitted by section 87(2) of the Public Service Commission Act.
30. On the question of the Interested Parties, it is the function of the County Public Service Board to recommend to the Governor persons for appointment as Chief Officers under section 45 of the County Governments Act.
31. The same Act in section 59 empowers the Board with the authority and mandate to establish and abolish offices within the county public

service.

32. The Governor produced before the Court a request made to the County Public Service Board to approve the establishment of the positions of Chief Officer Executive and Public Works, Transport and Chief Officer, Infrastructural Development.

33. The Board approved the establishment of the offices and informed the County Government through a letter dated 1 April 2021.

34. Thereafter, the positions were advertised, applicants shortlisted, and interviews conducted.

35. The Court cannot, therefore, find any illegality in the establishment of the two chief officer positions held by the Interested Parties.

36. The Petitioner also made an allegation that the positions had not been budgeted for. The Petitioner did not produce a copy of the budget to back up the allegations, and the Court cannot make a favourable finding on this ground.

37. Lastly, the Petitioner did not place any evidence before the Court to show that the contracts of the 4th to 14th Respondents had lapsed or that they had been re-appointed unilaterally by the Governor.

Conclusion and Orders

38. For the above reasons, the Court declines jurisdiction and strikes out the Petition with costs to the 4th, 5th, 6th, 7th and 9th Respondents, being the parties who filed submissions.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 24TH DAY OF NOVEMBER, 2021

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Petitioner	J. Kasina & Associates
For 1 st Respondent	SMS Advocates LLP
For 2 nd Respondent	
For 3 rd Respondent	Haron Ngeno/Oscar Sang, Advocates, c/o County Assembly
For 4 th and 7 th Respondents	SMS Advocates LLP
For 5 th , 6 th and 9 th Respondents	Ngania & Co. Advocates
For 10 th , 11 th and 13 th Respondents	Onyango Allan & Partners Advocates
For 12 th and 14 th Respondents	Ngugi Kamau, Advocates