



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT MALINDI**

**PETITION NO. E001 OF 2021**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 27, 28, 47, 50, 159, 165, OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF RULES OF 3 & 4 OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION) PRACTICE AND PROCEDURE RULES, 2013 AND ALL ENABLING POWERS AND PROVISIONS OF THE LAW**

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 22, 23, 27, 43, 47 AND 48 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF SECTIONS 4(3) (b), 5(2), 8(c), 7(2) (ii), 9, 11(1) OF THE FAIR ADMINISTRATIVE ACTION ACT NO.4 OF 2015**

**IN THE MATTER OF SECTIONS 8, 87, 88, 91, 96, 105, 106, 107 & 108 OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012**

**IN THE MATTER OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012**

**IN THE MATTER OF THE COUNTY PUBLIC SERVICE BOARD OF KILIFI**

**IN THE MATTER OF THE PREJUDICIAL, DISCRIMINATORY AND MALICIOUS APPOINTMENT OF THE DIRECTOR OF ENVIRONMENT AND THE SUBSEQUENT DEPLOYMENT OF ONE JIMMY KAHINDI YAA INTO OFFICE**

**- AND -**

**IN THE MATTER OF ARTICLES 152(2) (a) OF THE CONSTITUTION OF KENYA, 2010**

**- BETWEEN -**

**ZENA ACHIENG MOHAMED.....PETITIONER**

**- VERSUS -**

**THE COUNTY PUBLIC SERVICE BOARD, KILIFI.....1<sup>ST</sup> RESPONDENT**

**THE COUNTY CHIEF OFFICER ENVIRONMENT, FORESTRY, NATURAL**

**RESOURCES AND SOLID WASTE MANAGEMENT.....2<sup>ND</sup> RESPONDENT**

**JIMMY KAHINDI YAA.....3<sup>RD</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF KILIFI.....4<sup>TH</sup> RESPONDENT**

**THE COUNTY SECRETARY KILIFI.....5<sup>TH</sup> RESPONDENT**

**ALFONCE B. MURIMA.....6<sup>TH</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 19<sup>th</sup> November, 2021)

### JUDGMENT

The claimant filed the petition on 12.01.2021 through A. M. Omwancha & Company Advocates. The amended petition was filed on 07.06.2021. The petitioner prayed for:

- a. A declaration that the petitioner herein is a resident of Malindi Sub-County within Kilifi County and she was natively born and raised in Malindi and schooled at Malindi Central Primary School and subsequently joined Kombeni Girls in Kaloleni and thereafter pursued her degree in Pwani University in Kilifi hence the act of the respondents to deny and discriminate the petitioner by virtue of her middle name “**Achieng**” which is a Luo name is illegal *ab initio*, a contravention and infringement of the petitioner’s fundamental rights and freedoms contrary to Article 27(4) and Article 28 of the Constitution of Kenya, 2010.
- b. A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> respondents from confirming, deploying and allowing the 3<sup>rd</sup> respondent to assume office as Director of Environment of the 4<sup>th</sup> Respondent herein and a further order of injunction restraining the 3<sup>rd</sup> respondent from assuming office as the Director of Environment of the 4<sup>th</sup> Respondent.
- c. A declaration that the appointment of the 3<sup>rd</sup> respondent as the Director of Environment of the 4<sup>th</sup> respondent who failed to meet the requirements and threshold of being appointed as the Director of Environment as was required vide the advertisement for the position of Director of Environment dated 16.09.2019, the decision by the 1<sup>st</sup> and 4<sup>th</sup> respondents of appointing a committee which under reference No. CG/KLF/CO-ENV/ADMN/21/VOL.3/4 was based on discrimination, bias, tribal line, unjust and a violation of the petitioner’s fundamental rights and therefore null and void.
- d. A declaration that the petitioner herein is the most qualified, competent and suitable applicant to occupy the position of the Director of Environment as per the requirements and qualifications exhibited in the advertisement dated 16.09.2019.
- e. Any such other relief that the Honourable Court may deem fit and just to grant.
- f. The costs of the petition be awarded to the petitioner as against the respondents.

The petitioner’s case is as follows. The 1<sup>st</sup> respondent is established under section 12 of the County Governments Act, 2012. The 2<sup>nd</sup> respondent is an office established under section 45 of the Act. The 3<sup>rd</sup> respondent is employed by the 1<sup>st</sup> respondent and serves under the 2<sup>nd</sup> respondent’s office. The 4<sup>th</sup> respondent is established and formed per Article 176 of the Constitution. The 5<sup>th</sup> respondent is an office established per section 44 of the Act. The 6<sup>th</sup> and 7<sup>th</sup> respondents work for gain within the county of Kilifi.

The petitioner’s further case is that she was competitively appointed in 2016 as the Sub-County Environment Officer, Rabai and completed the probationary service and was confirmed in the permanent and pensionable service of the county of Kilifi as per the letter dated 13.04.2018. She says she has competently and diligently discharged the functions of the office. She was appointed Acting Director of Environment on 30.05.2019 awaiting the 1<sup>st</sup> respondent to appoint a competent person to fill the position of Director substantively.

Further, the 2<sup>nd</sup> respondent addressed the 1<sup>st</sup> respondent through the 5<sup>th</sup> respondent by the letter dated 16.09.2019 requesting for the internal advertisement to fill the position of the Director Environment competitively. The letter stated that the reason for internal advertisement was that the department had qualified officers who could be upgraded to fill the position. The letter attached the duties and requirements attached to the position. The requirements were as follows:

- a. Bachelor’s degree in Environmental Studies, Environmental Science, Natural Resource Management, Forestry and any other course from a recognised institution.
- b. A Master’s degree in any of the areas in (a) above or related field from a recognised institution as an added advantage.
- c. Have a relevant experience and distinguished career in environment management of not less than 10 years.
- d. Attended Senior Management Course (SMC) lasting not less than 4 weeks from a recognised institution.
- e. Attended Strategic Leadership Development Program (SLDP) lasting not less than 6 weeks from a recognised institution.
- f. Demonstrated managerial, administrative, and professional competence and exhibited thorough understanding of national goals, policies, objectives and ability to relate them to sustainable management of environment and natural resources.
- g. Be registered by Environment Institute of Kenya and be an EIA or EA expert.
- h. Show merit and ability as reflected in work performance and results.
- i. Demonstrated professional competence as reflected in work performance and results.

The 1<sup>st</sup> respondent issued the internal advertisement by its letter dated 24.02.2020 addressed to all Chief Officers in the Kilifi County Government for serving officers to apply. In the advertisement, the 1<sup>st</sup> respondent made the Master's degree a requirement rather than an added advantage and further required candidates to obtain tax compliance certificate from KRA, clearance certificate from HELB, clearance certificate from EACC, certificate of good conduct, and credit reference bureau clearance. On 24.08.2020 the 2<sup>nd</sup> respondent wrote to the 1<sup>st</sup> respondent explaining that the Master's degree was an added advantage because for all senior Government positions including President, the entry qualification was the undergraduate degree certificate. The petitioner applied for consideration.

The petitioner's further case is that on 21.05.2020 she visited the County website and she came across another advertisement by the 1<sup>st</sup> respondent and published on 19.05.2020 for the same position of Director Environment. Further the 1<sup>st</sup> respondent had unreasonably, unjustifiably, and inexcusably scrapped off including that Master's was a requirement and not an added advantage; relevant experience was 8 years rather than 10 years per earlier advertisement; the requirement of SMC had been removed; and the requirement of SLDP had also been removed. Further the advertisement of 19.05.2020 depicted that it was no longer an internal affair but the petitioner nevertheless, applied. (and the advertisement of 19.05.2020 has not been exhibited for the petitioner and the 1<sup>st</sup> respondent's invitation of shortlisted candidates for interviews shows that only serving officers had been shortlisted.)

The petitioner's further case is that the interview was conducted on 27.08.2020. The petitioner attended and the interview panel was chaired by the 6<sup>th</sup> respondent and the 2<sup>nd</sup> respondent attended and the 2<sup>nd</sup> respondent looked annoyed and disturbed. The 2<sup>nd</sup> respondent later disclosed to the petitioner, per her assertions, the 7<sup>th</sup> respondent as Chairperson of the 1<sup>st</sup> respondent had earlier chased her away on the interview day stating that her presence was not required at the interview panel yet she had been invited to participate per the 1<sup>st</sup> respondent's letter dated 05.08.2020 ready with interview questions and answers. Further, it was only after the 5<sup>th</sup> respondent intervened that the interview proceeded with participation of the 2<sup>nd</sup> respondent, the Chief Officer.

The petitioner further states in the petition thus, **"20. The Petitioner further avers that on 21<sup>st</sup> September, 2020 the 4<sup>th</sup> Respondent summoned the Chief Officer and herself to his office and stated that the 6<sup>th</sup> Respondent who chaired the interview panel had been to his office informing him that they were intending to give the position of Director of Environment to one Jimmy Kahindi Yaa the 3<sup>rd</sup> Respondent herein because despite the Petitioner's awesome qualifications she was not a "Mijikenda and not a local and therefore could not be appointed as a substantive Director."** The petitioner alleges that the 3<sup>rd</sup> respondent did not meet the qualifications as set out by the 2<sup>nd</sup> respondent's letters to the 1<sup>st</sup> respondent. The claimant further states that the 1<sup>st</sup> respondent had decided to appoint the 3<sup>rd</sup> respondent as the Director per the letter dated 16.12.2020 to take effect on 04.01. 2021. The decision was conveyed to the 3<sup>rd</sup> respondent by the letter dated 23.11.2020 (issued prior to 1<sup>st</sup> respondent's decision letter of 16.12.2020) and signed by Rose J. Ngowa, Chairman of the 1<sup>st</sup> respondent and the 7<sup>th</sup> respondent herein. It is the petitioner's case that the 1<sup>st</sup> respondent had a predetermination to appoint the 3<sup>rd</sup> respondent to the position and the appointment was irregular, unfair, against rules of natural justice, and biased in favour of the 3<sup>rd</sup> respondent on account of tribal affiliation.

The petitioner states that the 3<sup>rd</sup> respondent did not meet the requirements for appointment as per the advertisement dated 24.02.2020 and 2<sup>nd</sup> respondent's letter of 16.09.2019 and in particular he did not have the following:

- a. Relevant experience and a distinguished career in environment management of not less than 10 years.
- b. Attended SMC lasting not less than 4 weeks from a recognised institution.
- c. Attended SLDP lasting not less than 6 weeks in a recognised institution.
- d. Registered by the Environment Institute of Kenya as ELA or EA expert.

Further, by her advocates' letter dated 16.12.2020 the petitioner appealed to Public Service Commission per section 77 of the County Governments Act, and before filing the petition herein. The appeal letter was served upon the 1<sup>st</sup> respondent on 17.12.2020. The 1<sup>st</sup> respondent drew a letter on 17.12.2020 backdated to 16.12.2020 informing the 2<sup>nd</sup> respondent that the 3<sup>rd</sup> respondent had been appointed the Director effective 04.01.2021. The petitioner's case is that the appointment of the 3<sup>rd</sup> respondent was hurried as manifested in the 1<sup>st</sup> respondent addressing the appointment letter to the 3<sup>rd</sup> respondent directly instead of through the 2<sup>nd</sup> respondent. Under the Human Resource Manual, 2013, the 1<sup>st</sup> respondent's decision letter was to be addressed to the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent within 21 days from the date of the interview.

The petitioner's further case is that the petitioner herein is a resident of Malindi Sub-County within Kilifi County and she was natively born and raised in Malindi and schooled at Malindi Central Primary School and subsequently joined Kombeni Girls in Kaloleni and thereafter pursued her degree in Pwani University in Kilifi hence the act of the respondents to deny and discriminate the petitioner by virtue of her middle name "**Achieng**" which is a Luo name is illegal *ab initio*, a contravention and infringement of the petitioner's fundamental rights and freedoms contrary to Article 27(4) and Article 28 of the Constitution of Kenya, 2010.

The claimant further case is that she holds all the prescribed qualifications with over 17 years' experience and has served for 4 years since 18.01.2016 and as Acting Director of Environment from 01.06.2019 to 27.08.2019. It is her case that she has been maliciously and upon tribal discrimination and without justification or written reasons for the action, been denied the opportunity to serve as Director of Environment of the 4<sup>th</sup> respondent.

The petitioner's case is that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondent's decision, actions, and directions are *ultra vires*, biased, un-procedural, and a violation of the provisions of Articles 27(4), Article 32(3), Article 28, Article 47 of the Constitution of Kenya, 2010. Further, the

respondents' decisions being in violation of the Constitution, they are null and void. In the amended petition the petitioner further urged as follows:

- a. Some of the 1<sup>st</sup> respondent's officers begrudged her while she served as the Acting Director of Environment because the Acting appointment had been by the executive and yet the practice was that all appointments were by the Executive through the County Secretary as Head of Public Service.
- b. The 1<sup>st</sup> respondent applied inconsistent requirements in recruiting officers as analysed in paragraph 24(a) of the amended petition.
- c. In the initial recruitment as Sub-County Environment Officer the interviews were held in October 2014. Successful candidates reported to work in March 2015 but the petitioner's reporting letter was withheld until January 2016 and the petitioner read discrimination in all that.
- d. In 2018 she applied for the post of Chief Officer Environment. She appeared for interview but was denied interview on account of her ethnic background.
- e. The petitioner acted for more than 16 months but as at time of filing the petition she had not been paid by the 1<sup>st</sup> respondent the relevant acting allowance.
- f. The foregoing showed that the 1<sup>st</sup> respondent had vendetta against the petitioner.
- g. The advertisement had stated the appointment was to be upon term contract but the appointment letter to the 3<sup>rd</sup> respondent did not state as much and it did not set out the tenure of appointment.
- h. The appeal to the Public Service Commission was on 18.12.2020 and the Commission had taken no steps except the letter to the 1<sup>st</sup> respondent dated 18.01.2021 requesting submission of documents.
- i. The 1<sup>st</sup> respondent has failed to exhibit in Court the scoring sheets or matrix of the interviews held for the Director of Environment. Unverifiable interview results which were not signed have been exhibited.
- j. The Acting Chief Officer for Water and Sanitation has written on 12.02.2021 to Kilifi County Attorney for advisory whether the petitioner is lawfully in office and who has advised that the petitioner is holding office as Acting Director of Environment illegally despite the interim orders by the Court on status quo.

The 1<sup>st</sup> respondent opposed the petition by filing on 02.02.2021 the replying affidavit of Gideon C. Mumba through Njoroge Mwangi & Company Advocates. He does not state the office he holds but declares that he has authority of the 1<sup>st</sup> respondent to swear the affidavit. The 1<sup>st</sup> respondent's case is as follows:

- a. The dispute as understood is about recruitment of the 3<sup>rd</sup> respondent by the 1<sup>st</sup> respondent as the Director of Environment and as opposed to the petitioner. The proper Court is the Employment and Labour Relations Court.
- b. If the petitioner is dissatisfied with the 1<sup>st</sup> respondent's appointment of the 3<sup>rd</sup> respondent as the Director of Environment, the proper action is to appeal to the Public Service Commission per provisions of the Constitution, the County Governments Act, and the Public Service Commission Act, 2017. The petitioner has already preferred an appeal to the Commission by his letter dated 18.12.2020. The petition is therefore fundamentally flawed and incurably defective as the appeal to the Commission about the same dispute is pending.
- c. The 7<sup>th</sup> and 6<sup>th</sup> respondents are chairperson and vice-chairperson of the 1<sup>st</sup> respondent and the two ought not to have been sued.
- d. The 1<sup>st</sup> respondent admitted to competitively recruiting the petitioner and appointing her to the position of Sub-County Environment Officer and after probation she was confirmed on permanent and pensionable terms of service and the executive elevated her to Acting Director of Environment. The appointments show the 1<sup>st</sup> respondent is an equal opportunity employer and does not discriminate on account of tribe, gender, geographical location or any other bias contrary to the assertions by the petitioner.
- e. The initial recruitment for the post of Director of Environment was by internal advertisement but later a decision was made to advertise the position externally and serving officers were free to apply. The decision was not irrational or discriminatory and the petitioner applied, was shortlisted, and was interviewed. The requirements in the advertisement applied to all candidates. Five candidates were shortlisted and interviewed. They were scored per exhibit D of the replying affidavit. The best candidate was the 3<sup>rd</sup> respondent at 82.1%, the 2<sup>nd</sup> candidate was the petitioner at 79.1% and the 3<sup>rd</sup> candidate was Kanundu Ngumbao at 71.5 %. Thus the 3<sup>rd</sup> respondent was appointed and the petitioner retained her substantive position. The 3<sup>rd</sup> respondent merited the appointment and there were no tribal considerations. The 1<sup>st</sup> respondent reckons that the petitioner is in fact a "Kilifian" having been born, raised, bred and resided in Kilifi since birth. The petition should be dismissed.

The 1<sup>st</sup> respondent further opposed the amended petition by filing on the replying affidavit of Gideon C. Mumba sworn non 24.09.2021. It was urged as follows:

- a. He is the Deputy Director, Administration Services for the 1<sup>st</sup> respondent.
- b. The 1<sup>st</sup> respondent had wanted to exclude the chief officer from interviews because some applicants worked directly under the Chief Officer and there was likely of conflict of interest. Nevertheless, the Chief officer participated in the interviews.
- c. The letter of initial appointment of the claimant had delayed to be released to her because there were raised alleged issues of disciplinary matters with the previous employer, Kenya Forest Service (and the relevant complaint letter is exhibited).
- d. The petitioner was shortlisted for the position of Chief Officer as pleaded for her but on the interview day it was discovered that she had called a member of the interview panel.
- e. Under clause C. 14 (4) of the Public Service Human Resources Policies and Procedures Manual, 2016, the 1<sup>st</sup> respondent must consider and make decisions on acting appointments for Job Groups “Q” and above such as for Acting Director of Environment. The petitioner’s recommendation to act had never been forwarded to the Board as of to date.
- f. The 1<sup>st</sup> respondent cannot answer the petitioner’s allegations against other respondents or the Commission.
- g. The chairperson executed the letter of appointment of Director of Environment because the 1<sup>st</sup> respondent’s CEO was on leave on account of ill-health.
- h. The 1<sup>st</sup> respondent states that the 3<sup>rd</sup> respondent met all the criteria sought by the 1<sup>st</sup> respondent, was shortlisted, was interviewed and then found the best candidate.
- i. The scoring matrix is a confidential document that is not publicly disseminated as it contains a person’s ability as determined by the individual panellists. The same can only be released when officially applied for.

For the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents, the replying affidavit of the County Attorney one Michelle Bibi Fondo was filed on 15.10.2021 through John Bwire & Associates Advocates. It was urged as follows:

- a. The suit is defective and untenable for failure to exhaust the alternative dispute resolution mechanisms provided in Articles 234(2) (i) of the Constitution, section 77 of the County Government Act, and section 85 of the Public Service Act and clause K.10 of the Public Service Commission Human Resource Policies and procedures Manual for public service. In view of those provisions the Court lacks jurisdiction.
- b. The suit against the 2<sup>nd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> respondents is defective in view of the provisions of section 57 and 59 of the County Governments Act.
- c. The facts urged for the petitioner are denied in *toto*.
- d. By letter dated 16.09.2019 the 2<sup>nd</sup> respondent requested to fill various vacancies in the Department through internal advertisement.
- e. The 1<sup>st</sup> respondent acted on that request and on 24.02.2020 advertised the positions internally. It was agreed to include mandatory qualification of a Master’s degree.
- f. Another advert dated 19.05.2020 issued being an external advertisement. Master’s degree was mandatory.
- g. The 1<sup>st</sup> respondent shortlisted successful candidates on 17.08.2020a and interviews held on 27.08.2020. The claimant was a candidate.
- h. The 3<sup>rd</sup> respondent emerged the best candidate and was issued an appointment letter on 23.11.2020 (annexed as exhibit MBF 4 – but is not legible at all.).
- i. By the letter of 16.12.2020 the 1<sup>st</sup> respondent informed the 2<sup>nd</sup> respondent that the 3<sup>rd</sup> respondent had been successful. The 3<sup>rd</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondent proceeded to assign the 3<sup>rd</sup> respondent the duties of director.
- j. The 3<sup>rd</sup> respondent’s appointment was procedurally fair and allegations of favouritism and tribalism are neither here nor there.
- k. The petitioner was appointed to act as Director of Environment but the appointment did not entitle her to a substantive appointment. The appointment to act was by unauthorised officer and it was null and void *ab initio*.
- l. The process of recruitment is complete and the 3<sup>rd</sup> respondent has assumed office and the orders sought are not available.
- m. The amended petition be dismissed.

The petitioner filed supplementary affidavit on 25.10.2021 and stated as follows:

- a. Gideon C. Mumba is a Deputy Director, Administration and is not the 1<sup>st</sup> respondent's Secretary or CEO and is not a member of the 1<sup>st</sup> respondent and he lacked authority to make the replying affidavits on behalf of the 1<sup>st</sup> respondent. Section 57 of the County Governments Act and clause A.15 of the County Public Service Human Resource Manual, 2013 provides that the decisions of the 1<sup>st</sup> respondent are communicated by its Secretary.
- b. The 1<sup>st</sup> respondent has failed to address the concerns about manipulation of the indent to fit the preferred candidate. While exhibiting the letter by the Commission waiving SLDP, the requirements for Master's degree and SMC were never waived.
- c. A verifiable scoring matrix for the interview has not been provided.
- d. The former employer the Kenya Forest Service never suspended her and she worked there from 01.12.2002 to April 2015 and then resigned to prepare for joining the Kilifi County Government service and her appointment letter delayed by the 1<sup>st</sup> respondent until January 2016. The alleged letter was a scheme to deny her the job but it failed.
- e. She was shortlisted for Chief Officer post but on interview day the panel chairperson told her she would not be interviewed for reasons that were never disclosed to her. She never called a member of the panel as is being alleged.
- f. She was appointed to act as Director by the County Secretary who usually made such appointments per exhibited letters for other officers and the County Secretary made acting appointments in his capacity as the Head of County Public Service. The acting appointment has never been terminated and she continues to serve as such.

Final submissions were filed for the parties. The Court has considered all the material on record. The Court finds as follows.

To answer the 1<sup>st</sup> issue for determination the Court returns that all respondents were proper parties to the petition. For 2<sup>nd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> respondents it was submitted that they were wrongly sued because section 57 of the County Government Act establishes the 1<sup>st</sup> respondent as a body corporate with capacity to sue and be sued. Section 63 of the Act further provides that except as provided in the Constitution or legislation, the 1<sup>st</sup> respondent has the power to make appointments including promotions in respect of offices in the county public service. It was submitted that the case was about recruitment, selection and appointment of the Director for Environment by the 1<sup>st</sup> respondent and the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents cannot be held liable in that regard. It was submitted that in **Osman Abdullahi Sheikh –Versus- County Government of Garissa [2020]eKLR** the Court (Maureen Onyango J) held that the claimant was in employment of the Garissa County Public Service Board and further that the cause of action was against the Board and not the respondent because the actions complained of related to the Board. The Court finds that in the instant case the actions complained of relate all the respondents and while the reliefs sought may be directed only at some of the respondents and not all of them, the presence of the respondents was necessary to enable the Court to facilitate the just, expeditious, and proportionate resolution of the dispute as envisaged in section 3 of the Employment and Labour Relations Court Act, 2011. The Court makes the same finding with respect to the submission for the 1<sup>st</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents where it was submitted that in **Antony Francis Wareham t/a AF Wareham & 2 Others –Versus- Kenya Post Office Savings Bank [2004]eKLR**, the Court of Appeal held thus, **“It was also prima facie imperative that the Court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued....”**

The Court distinguishes the present proceeding which is by way of a constitutional petition and in which the petitioner makes specific allegations against all the respondents and therefore requiring their specific response to enable the Court arrive at an expeditious, just and proportionate determination in view of the constitutional provisions invoked.

While making the finding the Court has considered the elaborate provisions of Rule 5 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2010 on the addition, joinder, substitution and striking out of parties. The rule is clear that if the petitioner is in doubt of the proper respondent, two or more respondents may be sued for determination of between all the parties against whom the redress should be sought. The rule further provides that a petition shall not be defeated by reason of the misjoinder or non-joinder of parties and the Court may in every proceeding deal with the matter in dispute. Further the Court may order the substitution, striking out, or join parties as appropriate. The Court finds that until this judgment stage, there was no application to strike out any of the respondents and in any event the Court has found that the petitioner made specific allegations against the respondents jointly and severally. Further, the respondents have been shown to have played specific roles in the recruitment process and if the petitioner will succeed in his claims and prayers, it has been shown that the respondents will be affected or be required to take one or other step towards satisfaction of the reliefs sought. The Court has therefore found that all the respondents were necessary and proper parties to the petition.

The 2<sup>nd</sup> issue is whether the Court lacks jurisdiction in view of the pending appeal before the Public Service Commission against the recruitment and appointment of 3<sup>rd</sup> respondent as the Director of Environment in issue. It is submitted that the suit is defective and untenable for failure to exhaust the alternative dispute resolution mechanisms provided in Articles 234(2) (i) of the Constitution, section 77 of the County Government Act, and section 85 of the Public Service Act and clause K.10 of the Public Service Commission Human Resource Policies and procedures Manual for public service. In view of those provisions the Court lacks jurisdiction. The parties are aware and reckon that the issue was canvassed as a preliminary point and the Court (Ndolo J) delivered its ruling on 15.04.2021. The Court found that the petitioner was asking the Court to preserve the status quo pending the hearing and determination of her appeal before the Public Service Commission. The Court further found thus:

**“16. I do not think the Court can lock out a party seeking interim relief, on the basis of exhaustion principle provided under the County Governments Act and the Public Service Commission Act. I say so because, if the subject of appeal before the Public Service**

Commission dissipates, then the ultimate decision by the Commission could well be an exercise in futility.

**17. The petitioner submits that the appeal process before the Public Service Commission is long and tedious. I have looked at the Public Service Commission (County Governments Public Services Appeals Procedures) Regulations, 2016 and did not find any timelines given to the Public Service Commission within which to conclude appeals emanating from the County Governments. I also did not see any provision for interim relief pending determination of appeals lodged with the Commission. The effect of this is that actions forming the subject matter of appeals before the Commission could become entrenched and irreversible. In such an event, the resultant injustice to appellants would be great and the Court cannot ignore this exposure.”** The Court concluded that the preliminary objections raised for the respondents were without basis and were overruled with costs in the petition. The Court finds that the parties are bound by that finding and are precluded from urging the same issues as the Court is *functus officio* accordingly. Further, the Court has considered all material on record and it appears that after the petitioner appealed and the Commission asked the 1<sup>st</sup> respondent to forward relevant documents, no further progress has been shown to have taken place in the appeal (per the prevailing regulations) thereby making the fears in the cited ruling real, that the matters subject of the appeal may become entrenched and irreversible in absence of the Court’s intervention, at least on interlocutory basis or otherwise.

The 3<sup>rd</sup> issue is whether the petitioner has established the violation of the fundamental rights as alleged.

It is urged and submitted for the petitioner that under Sub-Article 27 (3) women and men have the right **to equal treatment** including the right **to equal opportunities in** political, **economic**, cultural and social spheres. It is also urged and submitted that under Sub-Article 27 (4) the state shall not discriminate directly or indirectly against any person on any ground including race, sex, status, religion, health status, **ethnic or social origin**, culture, belief, dress, language or birth.

On discrimination, the Court finds that the 1<sup>st</sup> respondent has not offered any explanation why it deviated from the requirements or qualifications as were set out in the original declaration of vacancy by the hiring department. It has not also been explained why the internal advertisement was made and then without official cancelation of the internal advertisement, the 1<sup>st</sup> respondent made an open or external advertisement but in which no explanation was made why no single non-serving officer was shortlisted. Of greater concern is that the 1<sup>st</sup> respondent has not disclosed the objective criteria it put in place and subjected all the candidates to make a finding that the 3<sup>rd</sup> respondent was the best suited and most successful. The Court finds that in absence of an objective scoring criteria and in absence of the 3<sup>rd</sup> respondent’s demonstrated qualification for the job, the petitioner has established that indeed she was not accorded equal treatment and she was not given an equal opportunity to fill the vacancy. The Court finds that the 3<sup>rd</sup> respondent despite being served, he failed to file a replying affidavit and there is no reason to discredit the petitioner’s case that the 3<sup>rd</sup> respondent did not possess the requirements to hold the office. While relying on the circular by the Public Service Commission purporting to waive the SLDP, the 1<sup>st</sup> respondent offered no explanation why mandatory SMC and, Master’s degree as an added advantage and not mandatory, were varied per the open or external advertisement. The 1<sup>st</sup> respondent also offered no evidence that it had domesticated the waiver by the Commission in its own considered decision and in view of Sub-Article 234 (3) (d) that the Commission’s power to waive the qualifications as done in the circular did to affect offices in county governments and, in view of Sub-Article 235 of the Constitution on uniform norms applicable to staffing of county governments. In absence of any other evidence and material explanation, the Court finds that the predetermined requirements for the post of Director of Environment were as per the original indent from the Department declaring the vacancy and it was not open for the 1<sup>st</sup> respondent to vary it except through due process entailing consultation of the user department and other provisions on setting of qualifications under the County Governments Act and the relevant policy documents. To that extent the petitioner has established the violation of the cited provisions of Sub-Article 27(3) of the Constitution.

Thus in **Chama Cha Mawakili (CCM) –Versus- Chairperson Independent Electoral and Boundaries Commission & 2 Others [2020]eKLR** the Court held, “....The Court holds that an objective and predetermined score sheet taking into account the qualifications in section 10(2) of the IEBC Act was crucial and mandatory. Similarly, the Court holds that it was mandatory to have an objective and predetermined score sheet for the interview process or other method invoked to recruit and select the most suitable candidate on headings contemplated in Articles 232(1) (g), (h) and (i) and Article 73(2) (a) of the Constitution and section 10(2) of the IEBC Act so as to demonstrate fairness and transparency and other values and principles in Articles 10, 232, and 73 of the Constitution. The score sheet must be completed for the candidates who have the basic prescribed qualifications at the shortlisting stage and then for each candidate progressing to the subsequent steps such as oral or written interviews. The Court holds that the 2<sup>nd</sup> respondent enjoys the discretion on the weight of scoring under any such headings in the score sheet but must show it was predetermined and objectively applied to all applicants. It is that individual scores are held in confidence to be disclosed to the concerned individual as he or she may request – but the score sheets and the related documentation guiding the process must be available for ascertaining the compliance in the recruitment process. In absence of such documentation of scores upon predetermined and objective criteria, the Court returns that it is difficult to make a finding of a recruitment, selection and appointment process that is consistent with the relevant statutory and constitutional provisions. The Court therefore returns that taking the material on record into account, it cannot be said that the recruitment, selection, and appointment process as challenged is continuing in accordance with the law.”

In the instant case, section 65 of the County Governments Act, 2012 provides that in selecting candidates for appointment the 1<sup>st</sup> respondent shall consider:

- a. The standards, values and principles set out in Articles 10, 27(4) 56(c) and 232 (1) of the Constitution.
- b. The prescribed qualifications for holding or acting in the office.
- c. The experience and achievements attained by the candidate.
- d. The conduct of the candidate in view of any relevant code of conduct, ethics and integrity.

- e. The need to ensure that at least thirty percent of the vacant posts at the entry level are filled by candidates who are not from the dominant ethnic community in the county.
- f. The need for open and transparent recruitment of public servants.
- g. Individual performance.

Subsection 65 (2) of the Act provides that in determining whether an appointment, promotion or re-designation has been undertaken in a fair and transparent manner, the overriding factors shall be merit, fair competition and representation of the diversity of the county.

The Court finds that the 1<sup>st</sup> respondent has failed to demonstrate that in appointing the 3<sup>rd</sup> respondent as the Director of Environment, the provisions of section 65 of the Act had been complied with. By failing to do so, the petitioner has thereby established that the appointment of the 3<sup>rd</sup> respondent was unreasonable and unfair in contravention of Article 47(1) of the Constitution which provides that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Court finds that once the petition was filed, the 1<sup>st</sup> respondent's constitutional duty to exhibit all relevant material to show compliance with section 65 of the Act accrued and alleging that such material was confidential is found unconstitutional as was unreasonable looking at the dispute at hand. In particular Article 10 (2) (c) required the 1<sup>st</sup> respondent to uphold good governance, integrity, transparency and accountability. Further, Article 73(2) required the 1<sup>st</sup> respondent to show that the recruitment, selection and appointment process was based on personal integrity, competence and suitability as well as objectivity and impartiality in decision making ensuring that it was not influenced with nepotism, favouritism, other improper motives or corrupt practices. Further, Article 232 (1) (e) and (f) imposed upon the 1<sup>st</sup> respondent the values and principles of accountability for administrative acts, and, transparency and provision to the public of timely, accurate information. To implement the cited constitutional values, principles and obligations and with respect to appointments by the 1<sup>st</sup> respondent, section 68 of the County Governments Act provides that the 1<sup>st</sup> respondent shall, subject to relevant legislation, maintain a record of all applications received in response to advertisements inviting applications and such record may be inspected by any person. Thus, the Court finds that it was misconceived for the 1<sup>st</sup> respondent to urge that the records in the recruitment, selection and appointment process were confidential and in absence of any other material on record, the Court finds that the impugned recruitment, selection and appointment proceeded in violation of Article 47(1) of the Constitution as it was unreasonable.

The petitioner alleged discrimination on account of her ethnic and social background. The Court finds that the petitioner has failed to establish that limb of claims. In particular, the petitioner alleged in the supporting affidavit thus, **“20. The Petitioner further avers that on 21<sup>st</sup> September, 2020 the 4<sup>th</sup> Respondent summoned the Chief Officer and herself to his office and stated that the 6<sup>th</sup> Respondent who chaired the interview panel had been to his office informing him that they were intending to give the position of Director of Environment to one Jimmy Kahindi Yaa the 3<sup>rd</sup> Respondent herein because despite the Petitioner’s awesome qualifications she was not a “Mijikenda and not a local and therefore could not be appointed as a substantive Director.”** The Court finds that the 4<sup>th</sup> respondent is the county government and under Sub-Article 176(1) it consists of a county assembly and a county executive. In the quoted paragraph 20 the petitioner does not identify the person who summoned the Chief Officer and herself and it must be misconceived and misleading to rely on that paragraph to establish the alleged ethnic bias. The 1<sup>st</sup> respondent's further replying affidavit of Gideon C. Mumba Deputy Director, Administration has established the circumstances under which the petitioner's initial letter of appointment as Sub-County Environment Officer had been delayed. It has been explained why the petitioner was not interviewed for the Chief Officer post. It has been explained why she had not been paid the acting allowance being that her acting appointment was by the executive and it had not been tabled before the 1<sup>st</sup> respondent for approval per prevailing requirement and the Court finds that the 1<sup>st</sup> respondent's case is buttressed by section 64(2) and (a) of the County Governments Act which provides that an acting appointment shall be made only by the lawful appointing authority and for a specified period; and a person shall not be appointed to hold a public office in an acting capacity unless the person satisfies all the prescribed qualifications for holding that public office. The 1<sup>st</sup> respondent has established that she was initially appointed by the 1<sup>st</sup> respondent despite her otherwise ethnic and social background. The Court further returns that the petitioner provided no evidence of the 3<sup>rd</sup> respondent's ethnic and social background to justify the allegation that he had been favoured and as against the petitioner on account of ethnic considerations. The Court finds that the petitioner has not established discrimination on account of ethnic and social background as alleged. While making the findings, the Court finds that it was sufficient that Gideon C. Mumba as of his own knowledge or as per disclosed sources and belief, he could attest to the material facts in his affidavits and there being no dispute that he is the Deputy Director, Administration for the 1<sup>st</sup> respondent, the Court returns that he had implied authority to make the affidavits.

The 4<sup>th</sup> issue is whether the petitioner is entitled to the remedies as prayed for. The Court makes findings as follows:

- a. The petitioner prays for a declaration that the petitioner herein is a resident of Malindi Sub-County within Kilifi County and she was natively born and raised in Malindi and schooled at Malindi Central Primary School and subsequently joined Kombeni Girls in Kaloleni and thereafter pursued her degree in Pwani University in Kilifi hence the act of the respondents to deny and discriminate the petitioner by virtue of her middle name **“Achieng”** which is a Luo name is illegal *ab initio*, a contravention and infringement of the petitioner's fundamental rights and freedoms contrary to Article 27(4) and Article 28 of the Constitution of Kenya, 2010. The Court has found that the petitioner has failed to establish discrimination on account of ethnic and social background. The respondents do not deny that she is a native and a resident of Kilifi. The Court has found that discrimination on account of ethnicity was not established. The Court finds that a declaration will issue that the petitioner herein is a resident of Malindi Sub-County within Kilifi County and she was natively born and raised in Malindi and schooled at Malindi Central Primary School and subsequently joined Kombeni Girls in Kaloleni and thereafter pursued her degree in Pwani University in Kilifi and she is entitled accordingly in her relationships with the respondents
- b. The petitioner prayed for a permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> respondents from confirming, deploying and allowing the 3<sup>rd</sup> respondent to assume office as Director of Environment of the 4<sup>th</sup> Respondent herein and a further order of injunction restraining the 3<sup>rd</sup> respondent from assuming office as the Director of Environment of the 4<sup>th</sup> Respondent. The Court has found that the appointment was impaired with the petitioner's established violations of Sub-Article 27(3) and Sub-Article 47(1) of

the Constitution and the injunction will issue in those terms.

c. The petitioner prayed for a declaration that the appointment of the 3<sup>rd</sup> respondent as the Director of Environment of the 4<sup>th</sup> respondent who failed to meet the requirements and threshold of being appointed as the Director of Environment as was required vide the advertisement for the position of Director of Environment dated 16.09.2019, the decision by the 1<sup>st</sup> and 4<sup>th</sup> respondents of appointing a committee which under reference No. CG/KLF/CO-ENV/ADMN/21/VOL.3/4 was based on discrimination, bias, tribal line, unjust and a violation of the petitioner's fundamental rights and therefore null and void. The Court has found that the petitioner has established on a balance of probability that the 3<sup>rd</sup> respondent lacked the requirements for the position and the appointment contravened Sub-Articles 27(3) and 47(1). A declaration will issue that the appointment of the 3<sup>rd</sup> respondent as the Director of Environment of the 4<sup>th</sup> respondent who failed to meet the requirements and threshold of being appointed as the Director of Environment as was required vide the advertisement for the position of Director of Environment dated 16.09.2019, and his appointment was based on discrimination, bias, injustice and a violation of the petitioner's fundamental rights under Sub-Articles 27(3) and 47(1) and therefore null and void.

d. The petitioner prayed for a declaration that the petitioner herein is the most qualified, competent and suitable applicant to occupy the position of the Director of Environment as per the requirements and qualifications exhibited in the advertisement dated 16.09.2019. The Court has found that in absence of an objective scoring criteria, it cannot be determined who of the candidates was best suited for the appointment. The Court returns that the prayer will fail as unjustified and unreasonable.

e. The petitioner has succeeded in the proceedings and costs of the petition will be awarded to the petitioner payable severally or jointly by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents and each respondent to bear own costs of the proceedings.

In conclusion judgment is hereby entered for the petitioner for:

1. The declaration that the petitioner herein is a resident of Malindi Sub-County within Kilifi County and she was natively born and raised in Malindi and schooled at Malindi Central Primary School and subsequently joined Kombeni Girls in Kaloleni and thereafter pursued her degree in Pwani University in Kilifi and she is entitled accordingly in her relationships with the respondents.
2. The permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> respondents by themselves, their agents, or officers from confirming, deploying and allowing the 3<sup>rd</sup> respondent to assume office as Director of Environment of the 4<sup>th</sup> Respondent herein and a further order of injunction restraining the 3<sup>rd</sup> respondent from assuming office as the Director of Environment of the 4<sup>th</sup> Respondent as the appointment was impaired by reason of the petitioner's established violations of Sub-Articles 27(3) and 47(1) of the Constitution of Kenya, 2010.
3. The declaration that the appointment of the 3<sup>rd</sup> respondent (as the Director of Environment of the 4<sup>th</sup> respondent) who failed to meet the requirements and threshold of being appointed as the Director of Environment as was required vide the advertisement for the position of Director of Environment dated 16.09.2019, and his appointment was based on discrimination, bias, injustice and a violation of the petitioner's fundamental rights under Sub-Articles 27(3) and 47(1) of the Constitution of Kenya, 2010 and therefore null and void.
4. The award of costs of the petition to the petitioner payable severally or jointly by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents, and, for the respondents, each to bear own costs of the proceedings.
5. The Deputy Registrar to cause transfer of the Court file to the Court's Sub- Registry at Malindi within 7 days from the date of this judgment.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 19<sup>TH</sup> NOVEMBER, 2021**

**BYRAM ONGAYA**

**JUDGE**