



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI**

**CONSTITUTIONAL PETITION NO E 005 OF 2021**

**IN THE MATTER OF ARTICLES 2,10,27,43,162,190,201,232,235 AND 258 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 55,57,60,62 AND 63 OF THE COUNTY GOVERNMENT ACT 2012**

**AND**

**IN THE MATTER OF SECTIONS 102 AND 107 OF THE PUBLIC FINANCE MANAGEMENT ACT 2012**

**AND**

**IN THE MATTER OF SECTIONS 3,4,5,7 AND 11 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF REGULATION 25 OF THE PUBLIC FINANCE MANAGEMENT (COUNTY GOVERNMENTS) REGULATIONS, 2015**

**AND**

**IN THE MATTER OF THE CONTRAVENTION OF FISCAL RESPONSIBILITY PRINCIPLES BY THE COUNTY GOVERNMENT OF LAMU**

**BETWEEN**

**1. DUNCAN KARIUKI GITAU**

**2. ISHAQ ABUBAKAR MOHAMED KHATIB**

**3. RAPHAEL GACHANJA NJENGA.....PETITIONERS**

**VERSUS**

**1. LAMU COUNTY PUBLIC SERVICE BOARD**

**2. THE COUNTY GOVERNMENT OF LAMU.....RESPONDENTS**

**RULING**

1. The three Applicants are all residents of Lamu County. They have filed these proceedings to challenge the decision of the Respondents to hire additional staff on the grounds that the exercise is in contravention of the law.

2. To commence the proceedings, the Applicants filed the Petition dated 14<sup>th</sup> October 2021. Contemporaneous with the said Petition, they filed the current application in which they seek conservatory orders against the 1<sup>st</sup> Respondent to prevent it from concluding the aforesaid staff hiring process pending the hearing and determination of the Petition. It is this application that is the subject of this ruling.

3. The application was filed under certificate of urgency. It was later so certified. The following are, inter alia, the orders the Applicants

seek:-

**a) That pending the hearing and determination of the application inter partes, the court be pleased to issue a temporary conservatory order restraining the 1<sup>st</sup> Respondent whether by itself or by its agents, servants and or employees or anybody howsoever acting under it from considering, deliberating, short listing, interviewing, selecting and appointing any persons and or proceeding in any manner howsoever with the recruitment exercise of the purported three hundred and one vacancies at the 2<sup>nd</sup> Respondent as published in the advertisement carried on the Daily Nation newspaper of 24<sup>th</sup> September 2021.**

**b) That pending the hearing and determination of the Petition filed herewith, the court be pleased to issue a temporary conservatory order restraining the 1<sup>st</sup> Respondent whether by itself or by its agents, servants and or employees or anybody howsoever acting under it from considering, deliberating, short listing, interviewing, selecting and appointing any persons and or proceeding in any manner howsoever with the recruitment exercise of the purported three hundred and one vacancies at the 2<sup>nd</sup> Respondent as published in the advertisement carried on the Daily Nation newspaper of 24<sup>th</sup> September 2021.**

**c) That costs of this application be provided for.**

4. The application is supported by the affidavits of the Applicants. It is opposed. The Respondents filed a replying affidavit through one John Mburu, the County Secretary of the 2<sup>nd</sup> Respondent.

5. According to the Applicants, the 2<sup>nd</sup> Respondent has two (2) administrative units designated as the Sub Counties of Lamu East and Lamu West. These two Sub Counties are subdivided into ten (10) Wards with Lamu East having three (3) of these Wards and Lamu West having the balance of seven (7).

6. The Applicants contend that section 50(1) of the County Government Act No. 17 of 2012 (CGA) establishes the office of a Sub County Administrator who is to be in charge of a single of every of the Sub Counties established in a County. Accordingly, the 2<sup>nd</sup> Respondent comprising of two (2) Sub Counties can only have two (2) Sub County Administrators.

7. The Applicants also contend that section 51(1) of the CGA establishes the office of Ward Administrator to be in charge of a single of every Ward established in a County Government. Accordingly, the 2<sup>nd</sup> Respondent comprising of ten (10) Wards can only have a maximum of ten (10) Ward Administrators at any given time.

8. The Applicants contend that of the ten (10) Wards that constitute the 2<sup>nd</sup> Respondent, nine (9) have serving Ward Administrators. Thus, they argue that the proposed recruitment of ten (10) Ward Administrators by the Respondents is *ultra vires* the provisions of section 51 aforesaid as there is only one (1) vacancy in these positions.

9. It is the contention of the Applicants that section 62 of the CGA empowers the 1<sup>st</sup> Respondent to establish or abolish public office in the County Government. However, any decision to establish or abolish such office must be submitted to and approved by the County Assembly.

10. The Applicants aver that on 24<sup>th</sup> September 2021, the 1<sup>st</sup> Respondent advertised some three hundred and one (301) vacancies in the establishment of the 2<sup>nd</sup> Respondent. These included ten (10) Ward Administrators and three (3) Sub County Administrators.

11. The Applicants contend that this advertisement is illegal for the following reasons:-

**a) As the 2<sup>nd</sup> Respondent comprises of two (2) Sub Counties, and section 50(1) of the CGA establishes one (1) office of Sub County Administrator for every Sub County, the 2<sup>nd</sup> Respondent can only have a maximum of two (2) Sub County Administrators. The advertisement by the 1<sup>st</sup> Respondent of three (3) positions of Sub County Administrator for the 2<sup>nd</sup> Respondent is therefore in contravention of this provision of law.**

**b) As the 2<sup>nd</sup> Respondent has only ten (10) Wards and nine (9) have Ward Administrators, the advertisement calling for ten (10) Ward Administrators is offensive to the law.**

**c) That as the establishment of the rest of the offices advertised did not go through the process of approval by the Lamu County Assembly as is required under section 62 of the CGA the entire advertisement of 24<sup>th</sup> September 2021 is illegal.**

12. But these are not the only grievances raised by the Applicants. They also contend that regulation 25 (a) and (b) of the Public Finance Management (County Governments) Regulations 2015 requires County Governments to set a limit of their expenditure on wages so as not to exceed 35% of the County Government's total revenue.

13. Yet, the wage bill of the 2<sup>nd</sup> Respondent was estimated at 65.9% of its total expenditure. This, the Applicants say they established from the County Governments Budget Implementation Review Report for the First Nine Months of FY 2020/21.

14. In the Applicants' view, to permit the 1<sup>st</sup> Respondent to hire the proposed three hundred and one (301) staff on behalf of the 2<sup>nd</sup> Respondent would only further balloon the 2<sup>nd</sup> Respondent's wage bill beyond the floor fixed by law. Thus, the proposed hiring is illegal and unreasonable. It is a violation of the fiscal responsibility placed on the 2<sup>nd</sup> Respondent by the Constitution, statute and regulations.

15. The Applicants also take issue with the appointment of some thirteen (13) Chief Officers which has already crystallized. In the Applicants' view, these officers were by law not to exceed eight (8) in number. Yet, thirteen (13) were illegally appointed.
16. The Applicants argue that because of the Respondents' reckless and illegitimate exercise of power, too much public resources were going towards sustaining the bloated wage bill at the expense of development programs in the County of Lamu. And hence their prayer that the process of hiring of new staff by suspended pending the hearing of the Petition.
17. The Respondents have opposed the application for conservatory orders. As indicated earlier, they have filed a replying affidavit sworn by John Mburu and dated 27<sup>th</sup> October 2021.
18. First, the Respondents aver that although the 2<sup>nd</sup> Respondent initially comprised of two (2) Sub Counties, these were later increased to three (3) when, by Gazette Notice No. 7408 issued on 2<sup>nd</sup> August 2017, the Central Government established Lamu Central as an additional Sub County. The Respondents have annexed exhibit JM 3 as proof of this development.
19. The Respondents aver that the three (3) Sub Counties currently do not have County Administrators as required by law as:-
- a) The contract of the acting Sub County Administrator for Lamu West lapsed on 20<sup>th</sup> June 2019 and was not renewed. Further, the Sub County had never appointed a substantive Sub County Administrator and had been relying on the acting Administrator to discharge the functions of the office. The position is therefore vacant. The Respondents have annexed the letters marked JM 4 (a) and (b) as proof of their assertion.***
- b) The Sub County Administrator for Lamu East was transferred from that position to the 2<sup>nd</sup> Respondent's department of health on 12<sup>th</sup> March 2018 leaving the Sub County without an administrator. The Respondents have annexed the letters marked JM 5 (a) and (b) as proof of their assertions.***
- c) The newly established Lamu Central Sub County has never had a Sub County Administrator appointed to it.***
20. Therefore, the Respondents argue that the advertisement for three (3) Sub County Administrators is based on the fact that the 2<sup>nd</sup> Respondent has three (3) Sub Counties. Further that since all the three (3) Sub Counties do not have administrators, it is lawful to recruit persons to take up these positions.
21. In respect of Wards, the Respondents aver that the 2<sup>nd</sup> Respondent has a total of ten (10) Wards. By law, each of these Wards requires a Ward Administrator meaning that the 2<sup>nd</sup> Respondent must at any given time have ten (10) Ward Administrators.
22. The Respondents aver that of these ten (10) positions, five (5) are vacant as four (4) Ward Administrators have since been redeployed as part of the 2<sup>nd</sup> Respondent's staff progression policy. The other one (1) was employed as an Administrator but has been serving as Ward Administrator. Therefore this office is technically vacant and requires to be filled.
23. The other five (5) Ward Administrators are due for redeployment under the 2<sup>nd</sup> Respondent's staff progression policy which is critical in ensuring staff motivation and satisfaction. However, the Respondents need to recruit new individuals that are suitably qualified to take up the positions of the departing Ward Administrators.
24. The Respondents therefore argue that the advertisement of the positions of ten (10) Ward Administrators is factually justified. Besides, it is premised in law.
25. In relation to the Chief Officers, the Respondents argue that an advertisement was run for twelve (12) positions. Ultimately, some thirteen (13) individuals were appointed by the Governor upon approval by the Lamu County Assembly.
26. That while it is true that the 2<sup>nd</sup> Respondent has eight (8) members of the County Executive Committee (CECs), the law does not cap the number of Chief Officers to that of CECs. That the fact that every Chief Officer has, by law, to report to a particular CEC is not to be understood to mean that where a County has for instance eight (8) CECs such as the 2<sup>nd</sup> Respondent, it must necessarily have only eight (8) Chief Officers. The law does not fix the maximum number of Chief Officers that a County Government ought to hire.
27. In the Respondents' view, the thirteen (13) individuals appointed as Chief Officers of the 2<sup>nd</sup> Respondent were lawfully appointed and are legally in office. In the Respondents' view, these appointments are indeed in public interest as they go towards ensuring optimum service delivery to the local community.
28. The Respondents deny that the 1<sup>st</sup> Respondent has created or abolished any office in pursuance of the powers bestowed on it in this respect. They further deny that the advertisement of 24<sup>th</sup> September 2021 was meant to fill positions in allegedly newly established offices.
29. The Respondents take the position that all the positions advertised already exist in the 2<sup>nd</sup> Respondent's human resource department. As such they needed no approval from the County Assembly of Lamu.
30. The Respondents have annexed documents to suggest that the following positions have been in existence and that they are among those that are vacant: Accountant 1; and Principal Finance Officer.

31. As well, the Respondents argue that the 2<sup>nd</sup> Respondent lacks sufficient tutors for its vocational training institutions. Further, that the 2<sup>nd</sup> Respondent needs to hire staff (including teachers) to implement the Early Childhood Development Education (ECDE) programme in line with the 2006 ECDE standard guidelines. To support the argument that the position of instructors in the Department of Education and Vocational Training already exist, the Respondents have annexed document JM 11 which is data from the office of the Chief Officer, Education and Vocational Training.

32. The Respondents deny that the 2<sup>nd</sup> Respondent's employee compensation expenditure is above the statutory limit as suggested by the Applicants. They argue that this vote has always been below 35% of its total revenue in line with the law.

33. In support of this position, the Respondents have filed exhibits marked JM 13 and 14 (summaries of budgets for financial years 2019/2020 and 2020/2021). The documents suggest that employee compensation vote for the period has ranged between 30% and 33.24% of the total revenue of the 2<sup>nd</sup> Respondent for the period covered.

34. The Respondents have further annexed the supplementary budget for the year ending June 2022 (see JM 15). The forward to the document suggests that although the total recurrent expenditure for the 2<sup>nd</sup> Respondent for the year 2021/2022 stands at 60.7% of its total budget, employee compensation obligations stand at 33.32%. On the other hand, the development vote stands at 39.27% of the total budget. The Respondents therefore contend that the proposed recruitment will not result in a bloated staff portfolio that will occasion the staff compensation obligations to exceed the limits set by law.

35. The Respondents argue that the Petition together with the application for conservatory orders is an abuse of the court process. In their view, the Applicants have failed to demonstrate that the Respondents' actions have infringed any of the Applicants' constitutional rights. As a consequence, the Respondents pray that the application be dismissed.

36. The parties agreed to have the application heard through written submissions. Both counsels have filed their submissions. I will therefore proceed to determine the application on the basis of the parties' positions as expressed in the documents filed by them as relates to the application.

37. At the very outset, it is perhaps necessary to point out that although courts of law may interfere in the managerial prerogative of an employer to manage the workforce, such interventions must only happen in exceptional circumstances. Courts should as a general principle avoid this endeavour except where it is clear that the employer's actions are in breach of the law or some other internal rules of engagement agreed on by the parties.

38. This position has been expressed in a number of cases. In ***Geoffrey Mworira v Water Resources Management Authority [2015] eKLR for instance the court had this to say on the issue:-***

***"The court will very sparingly interfere in the employer's entitlement to perform any of the human resources functions such as recruitment, appointment, promotion, transfer, disciplinary control. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provisions of the Constitution or legislation; or in breach of the agreement between parties; or in a manner that is manifestly unfair in the circumstances of the case; or internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through employer's internal process."***

39. In ***Thomson Kerongo & 2 Others v James Omariba Nyaoga & 3 Others [2017] eKLR*** while dealing with disciplinary matters the court said this of the employer's discretion:-

***"The Court is not expected to enter into the boardrooms of the employers to micro manage their affairs.... The court will only interfere where there is breach of the process and even so, only with a view to setting the process right."***

40. This statement is true in respect of conducting disciplinary processes at the workplace as it is for undertaking recruitment of employees. And it applies to all employers whether in the private or public sector (see ***Republic v County Government of Marsabit, Department of Agriculture, Livestock and Fisheries Development & 2 others; Wato Denge Halake (Interested Party) Ex-Parte Guyo Shanda Umuro [2020] eKLR***). Consequently and guided by the foregoing, this court will only interfere with the Respondents' powers to recruit staff in the impugned process if there is evidence of breach of the law or some internal human resource policy applicable to the Respondents.

41. Secondly, the court must be satisfied that the Applicants are entitled to file these proceedings before it can proceed to entertain them. I believe that this is the point the Respondents make when they argue that the Applicants have not demonstrated that any of their rights have been infringed or are threatened with infringement so as to entitle them to file the current constitutional Petition.

42. In respect of this issue, I note that the Applicants are residents of Lamu County. As residents of this County, they have a legitimate entitlement to sound management of its affairs in order to ensure that the constitutional dictates of devolution are met by the County. Indeed, article 258 of the Constitution of Kenya 2010 entitles them to challenge any actions by the Respondents which appear to impede the values and objects of devolution as set out in chapter eleven (11) of the Constitution. As the Constitution itself proclaims, every person has a duty to defend it.

43. In my view therefore, constitutional Petitions are not only to be resorted to in instances where a right under the Bill of Rights has been violated or is threatened with violation. They can be invoked to defend the objects of the Constitution outside the Bill of Rights.

44. Having regard to the foregoing, I think that the Applicants are properly before this court in so far as they seek to question the propriety of the Respondents' powers to hire staff vis a vis its impact on the overall objects of sustainable development of the County Government of

Lamu in the context of chapter eleven (11) of the Constitution.

45. Having said thus, the court is alive to the fact that what is before it at this preliminary stage is only the interlocutory motion for conservatory orders. The main Petition is to be decided at a later stage. At this point, the court's concern is to establish whether the Applicants have placed before it sufficient material to establish a prima facie case to warrant the grant of the conservatory orders sought.

46. In *Mrao v First American Bank of Kenya Limited & 2 Others* [2003] eKLR, the court described a prima facie case in the following terms:-

***“ I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

47. But this is not the only factor that the court must consider while determining whether or not to grant conservatory orders. In the case of *the Board of Management of Uhuru Secondary School v City County Director of Education & 2 others* [2015] eKLR relied on by the Respondents, the court while analyzing several other decisions attempted to identify the factors that the court must consider in addition to the establishment of a prima facie case. These include the following:-

a) ***Whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights;***

b) ***Whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory.***

c) ***The effect of grant or failure to grant the orders on the need to ensure public interest is promoted.***

I will as well and where appropriate be guided by and take into account the foregoing principles in evaluating the prayers in the application.

48. The first point of contention in the application relates to the advertisement of vacancies for three (3) Sub County Administrators. Whilst the Applicants challenge this on the ground that the 2<sup>nd</sup> Respondent has only two (2) Sub Counties namely Lamu East and Lamu West, the Respondents argue that the County now has three (3) Sub Counties. This is because the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government, with the approval of the President, established a third Sub County called Lamu Central. This was done via Gazette Notice No. 7408 published on 2<sup>nd</sup> August 2017.

49. However, the Applicants argue that the Sub County created by Gazette Notice No. 7408 is an administrative unit for the national government having been established under the National Government Co-ordination Act, (Act No. 1 of 2013) (NGCA). It is their position that section 14 of the Act entitles the national government to establish administrative units in a County but solely for purposes of running national government programs. As a result, Lamu Central cannot be considered as a Sub County for purposes of the devolved government.

50. I have looked at the law on this matter. Article 6 of the Constitution declares national and county governments as distinct but interdependent. It further obligates the national government to ensure reasonable access to its services in all parts of the Republic. I believe it is with this in mind that section 14 of the NGCA was enacted.

51. Article 176 (2) of the Constitution of Kenya 2010 requires every County Government to decentralize its functions and services to the extent that is efficient and practicable. In line with this, Part VI of the County Government Act (CGA) was enacted. It addresses the matter of further decentralization of functions and administrative units in Counties.

52. Under section 48(1) (b) of the CGA, Sub Counties are equivalent to the constituencies within the County established under Article 89 of the Constitution. The 2<sup>nd</sup> Respondent has two (2) constituencies: Lamu East and Lamu West. Therefore, in terms of section 48 of the CGA, it can only have two (2) Sub Counties for purposes of the devolved government.

53. Prima facie, the third (3) Sub County (Lamu Central) was established as a unit of and exists for purposes of serving the national government and in line with the NGCA it's to be staffed by the national government. Indeed, this should explain why, as the Respondents point out in paragraph 13 of the affidavit by John Mburu, all the ten (10) Wards in the County of Lamu fall either in Lamu East or Lamu West. Lamu Central has no Ward attached to it. It is therefore clear to me on the material placed before me at this preliminary level that the Respondents are not entitled by law to appoint a Sub County Administrator for Lamu Central.

54. With respect to the other two Sub Counties, there is preliminary evidence that the offices of the Sub County Administrators are vacant. One of the administrators' contracts lapsed in June 2019 and was not renewed (see JM 4(b)). The other Sub County Administrator was in March 2018 transferred to the 2<sup>nd</sup> Respondent's department of health.

55. By virtue of section 50(1) of the CGA, these two Sub Units are to be manned by one Sub County Administrator each. These being statutory positions, they do not require to be established by the 1<sup>st</sup> Respondent. And neither do they require the approval of the County Assembly of Lamu for their validity. Therefore, it would amount to barring the Respondents from discharging their statutory mandate in respect of the two positions if the court were to issue orders barring them from filling the vacant positions.

56. The Applicants argue that the position of Sub County Administrator being a statutory one, officers appointed to this office cannot be redeployed to other positions by the 1<sup>st</sup> Respondent. However, there is nothing in the law to support this position.

57. The upshot of the foregoing is that the court finds that the Applicants have prima facie, established that hiring a Sub County Administrator for Lamu Central Sub County would be in contravention of the law. Accordingly a conservatory order is hereby issued barring this appointment with respect to this Sub County only pending full hearing and determination of the Petition.

58. As for Lamu West and Lamu East Sub Counties, the Applicants have not established a prima facie case to warrant stoppage of recruitment of the two Sub County Administrators to run the two Sub Counties. Accordingly, the court declines to issue conservatory orders in respect of these two appointments.

59. With respect to the Ward Administrators, the Applicants argue that there is only one (1) vacancy that has fallen due. Therefore, the attempt by the 1<sup>st</sup> Respondent to hire ten (10) individuals to these positions is illegal and unreasonable.

60. However, the available preliminary evidence demonstrates that whilst the 2<sup>nd</sup> Respondent has ten (10) Wards, only six (6) Ward Administrators currently remain in office. From paragraph 10 of the replying affidavit of John Mburu, there is prima facie evidence that the following individuals who were serving as Ward Administrators have since left those positions: Abarufa Dido; Fahima Ararat Abdallah; Dominic Maina; Khalifa Khalifa.

61. The office of Ward Administrator is a creation of section 51 of the CGA. It is not established by the 1<sup>st</sup> Respondent. Consequently, it requires no approval from the County Assembly of Lamu to come into existence.

62. By virtue of section 51(2) of the CGA, the 1<sup>st</sup> Respondent has a statutory obligation to appoint Ward Administrators for the 2<sup>nd</sup> Respondent. In my view therefore, the 1<sup>st</sup> Respondent had an obligation in law to fill the vacant positions as soon as they fell vacant. This remains so until the positions are competitively filled. The impugned advertisement is therefore only in furtherance of this obligation.

63. However, as I have said, the obligation to fill the vacancies arises only when the offices fall vacant. The Respondents admit that five (5) positions of Ward Administrators are still occupied. The Respondents assert that they only want to recruit the new Administrators in anticipation of redeploying the current occupants of the five (5) offices to other positions. But there is no evidence of vacancies in the positions that the officers are to be redeployed. And neither are the positions disclosed. To attempt to recruit Ward Administrators whilst there are still individuals lawfully occupying these offices prima facie appears to run afoul section 51(1) of the CGA which provides thus, ***“there is established for each Ward in a county the office of the Ward administrator.”***

64. There is also one administrator by the name Fartun Abdi who allegedly was appointed as an Administrator but not a Ward Administrator. Prima facie, this officer is in office at the instance of the Respondents. It therefore appears improper in terms of section 51(1) of the CGA to recruit another Ward Administrator while she is still holding office.

65. The Applicants argue that the 1<sup>st</sup> Respondent has no powers to redeploy Ward Administrators to other positions within the 2<sup>nd</sup> Respondent as this is a statutory position. However, there is no provision of law expressly raising this bar. At best, this can only be a matter for interpretation upon full hearing of the Petition.

66. The sum total of the foregoing is that the court finds that there is prima facie evidence that there are only four (4) vacancies in the offices of Ward Administrators. In terms of section 51(1) the Respondents can only seek to fill these four (4) and not all the ten (10) positions. I therefore issue a conservatory order in respect of the six (6) Ward Administrator positions in respect of which the offices are still occupied pending the hearing of the current Petition.

67. With respect to the Chief Officers, the Applicants argue that they were to be no more than eight (8) to match the eight (8) CEC offices as per law. However, prima facie, the law does not appear to provide for this, at least expressly. This remains a matter for interpretation which can only be resolved upon full hearing of the Petition.

68. Importantly though, the court notes that the thirteen (13) individuals proposed for to serve as Chief Officers have already been appointed by the 2<sup>nd</sup> Respondent's Governor and approved by the County Assembly. In my view, conservatory orders cannot issue to conserve the status quo ante. As a result, a determination of the validity of these appointments shall await the hearing of the Petition.

69. A key issue in the Application and later the Petition is whether the rest of the offices were established in accordance with section 62 of the CGA. The section provides as follows:-

***“Powers of the County Public Service Board to establish or abolish office***

***a) Taking into account the provisions of this Part, the County Public Service Board on its own motion, may establish or abolish any office in the county public service.***

***b) The County Public Service Board shall give the county chief officer of the concerned department an opportunity to make representation in respect of any action to be taken under this section before making the decision in that regard.***

***c) If the County Public Service Board establishes an office and the concerned department fails to fill the vacancy for a period of twelve months after its establishment, the office shall stand abolished and the County Public Service Board shall not be required to make a decision to abolish that office.”*** (emphasis added by underlining)

70. My understanding of this provision is that any other office in County public service can only be established by the County Public Service Board and approved by the County Assembly. And these offices do not arise automatically upon establishments of departments in the

County. Rather, departments must propose the offices required and these are then established in terms of section 62 of the CGA.

71. While the Applicants argue that all the offices were established in contravention of this piece of legislation, the Respondents argue that all the positions advertised have been in existence and that they only fell vacant prompting the need to fill them. Is there prima facie evidence to buttress either of the positions by the disputants?

72. The Respondents have provided evidence to demonstrate, at least at this preliminary stage, that the 2<sup>nd</sup> Respondent has set up a department of Education, Technology and Vocational Training. Further, they have annexed exhibit JM11, a document from this department, containing the ECDE data showing the teacher-child ratio in every of its wards.

73. Prima facie, the 2<sup>nd</sup> Respondent had in existence the position of teachers prior to the impugned advertisement. This is so because the preliminary data aforesaid shows the number of teachers hired by the 2<sup>nd</sup> Respondent against the total number of instructors in every of the institutions listed as at August 2021. This data was compiled before the advertisement of 24<sup>th</sup> September 2021 seeking to recruit more teachers was run.

74. Therefore, it is more probable than not that the proposed recruitment of teaching staff is only meant to increase staff in an already established position to address the imbalance in the teacher-student ratio as asserted by the Respondents. It is improbable that the ECDE centers listed in JM 11 have been running without instructors.

75. In the premises, I find that there is no prima facie evidence presented by the Applicants to suggest that the office of instructors to these ECDE establishments is newly established and needed approval from the County Assembly of Lamu before the hiring of teaching staff is undertaken. Accordingly, I decline to issue conservatory orders to bar the Respondents from recruiting the proposed 182 assistant ECDE teachers, 5 graduate ECDE teachers and 3 ECDE supervisors.

76. Annexure JM 9 is a letter by the 2<sup>nd</sup> Respondent dated 2<sup>nd</sup> June 2021 releasing its Accountant 1 who had retired. This letter provides prima facie evidence that the office of Accountant 1 has been in existence in the 2<sup>nd</sup> Respondent's human resource portfolio. That the said office has fallen vacant is evident from the fact of the retirement of the previous holder thereof.

77. The 1<sup>st</sup> Respondent has advertised for three (3) vacancies in this office. Having found that there is prima facie evidence that the office of Accountant 1 pre-existed the advertisement of 24<sup>th</sup> September 2021, there is no sound basis to bar the Respondents from finding replacements to those who have retired from the position or indeed complementing the staff already in service in this position. I will therefore not issue conservatory orders to bar the recruitment of the three (3) proposed Accountant 1 positions.

78. For the rest of the positions listed in the advertisement in the Daily Nation of 24<sup>th</sup> September 2021 that have not specifically been addressed above, that is to say, positions 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32 and 33, it is to be noted that the Applicants contend that these positions are new and have not received the approval of the County Assembly of Lamu after they were established by the 1<sup>st</sup> Respondent in terms of section 62 of the CGA. Aware of the position taken by the Applicants on the positions, the Respondents have not produced evidence of approvals for their establishment by the County Assembly of Lamu. Similarly, there is no evidence on record to show that these various offices pre-existed the advertisement of 24<sup>th</sup> September 2021 and that the Respondents are only filling vacancies arising in them.

79. In the ordinary course of events and in terms of section 112 of the Evidence Act, the Respondents are expected to have in their control information on when the said offices were established and when the County Assembly of Lamu gave its approval for them. These facts are, in the words used in section 112 of the Evidence Act, within the special knowledge of the Respondents.

80. I was careful not to issue any interim conservatory orders in the cause in order to provide time for parties to file all documents that would assist the court in reaching a just resolution of the application. However, as at the time of hearing the motion, the Respondents had not filed any proof of approval by the County Assembly of Lamu for the positions in paragraph 78 above. As a result, it can only be reasonably inferred that the Respondents did not file this evidence because the approvals did not probably issue as required by law. I will therefore grant conservatory orders restraining the 1<sup>st</sup> Respondent from carrying on with the recruitment with regard to the positions listed in paragraph 78 above until the Petition is heard and determined.

81. The Applicants have urged me to bar all proposed appointments on the ground that they will result in the ballooning of the wage bill of the 2<sup>nd</sup> Respondent beyond 35% of its total revenue as provided for in law. I have anxiously considered this ground. Even as the Applicants rely on the report of the Controller of Budget for the first nine (9) months of the financial year 2020/2021 to advance their argument on this point, the Respondents have filed a number of documents showing that the 2<sup>nd</sup> Respondent's employee compensation vote has over the years consistently been below 35% of its total budget. In the premises, whether the 2<sup>nd</sup> Respondent's employee compensation expenditure has exceeded the limits set by law is a contested fact that will require resolution at the full hearing of the Petition.

## 82. Conclusion

a) The Applicants partially succeed in the application.

b) There is prima facie evidence that the administrative unit of Lamu Central Sub County is a unit in the service of the national government and not the 2<sup>nd</sup> Respondent. Accordingly, the court is reluctant to allow the Respondents to make appointments to fill the position of Sub County Administrator for Lamu Central Sub County until this Petition is heard and determined. Conservatory orders are thus hereby issued restraining the 1<sup>st</sup> Respondent from filling the position of Sub County Administrator, Lamu Central

Sub County until the Petition is determined on merits. For the avoidance of doubt, the orders mean that the Respondents shall not engage more than two (2) Sub County Administrators until after this Petition is determined.

c) There is prima facie evidence that there are no vacancies in the offices of six (6) Ward Administrators. Only four (4) vacancies exist out of the total ten (10) positions. It appears contrary to the law to seek to fill these six (6) positions when they still have office holders. Accordingly, conservatory orders are hereby issued to restrain the 1<sup>st</sup> Respondent from proceeding with recruitment of six (6) Ward Administrators in respect of Wards where we still have office holders.

d) On the basis of the facts on record, the offices of ECDE staff appear to pre-exist the advertisement of 24<sup>th</sup> September 2021. They, prima facie are not newly established positions. Therefore, it did not require the approval of the County Assembly of Lamu for the 1<sup>st</sup> Respondent to advertise for the position of ECDE assistant and graduate teachers and supervisors. Accordingly, the court declines to issue conservatory orders in respect of the proposed hiring of ECDE assistant and graduate teachers and supervisors.

e) The position of Accountant 1 is found to have been in existence prior to the advertisement of 24<sup>th</sup> September 2021. Accordingly, there is no prima facie evidence to suggest that the position is newly established and required approval of the County Assembly of Lamu before it is filled as suggested by the Applicants. The court therefore declines to issue interim conservatory orders to bar the Respondents from recruiting individuals to take up the three (3) positions of Accountant 1.

f) For the other positions listed in the advertisement in the Daily Nation of 24<sup>th</sup> September 2021, that is to say, positions 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32 and 33, in the advertisement, the Applicants contend that they have not received the approval of the County Assembly of Lamu in terms of section 62 of the CGA after they were established by the 1<sup>st</sup> Respondent. However the Respondents deny this. Despite the provisions of section 112 of the Evidence Act, the Respondents have not produced evidence of such approval. Similarly, there is no evidence on record to show that these various offices had been in existence prior to the advertisement of 24<sup>th</sup> September 2021 and that the Respondents were only seeking to fill vacancies in them. Accordingly, a conservatory order restraining the 1<sup>st</sup> Respondent from carrying on with the recruitment of staff with regard to the positions listed in paragraph 78 of this ruling is hereby issued until the Petition is heard and determined.

g) With regard to the thirteen (13) Chief Officers, the court notes that these individuals have already been appointed and are serving. The court will therefore not issue orders against them as to do so is to seek to prevent an act that has already happened. This matter can only be appropriately resolved upon full hearing of the Petition.

h) On the question of whether the 2<sup>nd</sup> Respondent's employee compensation obligations exceed the statutory maximum, I note that there is some form of evidence to suggest that this item of the budget has consistently been below 35% of the 2<sup>nd</sup> Respondent's total budgets over the years. This is despite the Applicants' position that the wage bill of the 2<sup>nd</sup> Respondent is currently in excess of 65.9% of its total budget. In the premises, I hold that this is a contested fact that requires resolution during the full hearing of the Petition.

i) On costs of the application, I order that they shall abide the directions to be given in the Petition.

**DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF NOVEMBER, 2021**

**B O M MANANI**

**JUDGE**

In the presence of:

.....for the Applicants

.....for the Respondent